

461

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 461

**HERBERT APTHEKER, ET AL.,
APPELLANTS,**

vs.

THE SECRETARY OF STATE.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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[fol. 4]

[File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 3886-'62

HERBERT APTHEKER, 32 Ludlam Place, Brooklyn,
New York, Plaintiff,

v.

THE SECRETARY OF STATE, Department of State,
Washington, D. C., Defendant.

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FROM
REVOCATION OF PASSPORT—Filed December 14, 1962**

The plaintiff, Herbert Aptheker, by his attorneys, complaining of the defendant, The Secretary of State of the United States, alleges:

1. The Court has jurisdiction of this action under sections 11-305 and 11-306 of the District of Columbia Code; sections 2201, 2282 and 2284 of 28 U.S. Code; and section 10 of the Administrative Procedure Act, 5 U.S. Code section 1009.

2. The plaintiff was born in the United States of America. He is now, and has at all times been since birth, a citizen of the United States of America.

3. On January 21, 1962, the plaintiff was the holder of a United States passport issued by the defendant.

4. On January 22, 1962, the Acting Director of the Passport Office of the Department of State notified the plaintiff that by direction of the defendant the plaintiff's passport was revoked because the Department of State believed that use by plaintiff of a United States passport would be in violation of section 6 of the Subversive Activities Control Act, 50 U.S. Code, section 785.

5. Thereafter, at the request of the plaintiff and pursuant to regulations issued by the defendant, an administrative hearing was held in the Department of State to [fol. 5] review the revocation of plaintiff's passport. The hearing culminated in a decision, dated October 26, 1962, by the Director of the Passport Office of the Department of State that the revocation of plaintiff's passport was required under section 6 of the Subversive Activities Control Act.

6. Pursuant to regulations of the defendant, the plaintiff appealed the decision of the Director of the Passport Office to the Board of Passport Appeals of the Department of State. Following a hearing before the Board, the Board found that "there is a preponderance of evidence in the record to show that at all material times [the plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act." On the basis of this finding, the Board recommended to the defendant that he affirm the decision of the Passport Office to revoke plaintiff's passport.

7. On or about November 23, 1962, the defendant approved the recommendation of the Board of Passport Appeals, specifically adopted as his own the above-quoted finding of the Board, and on the basis of that finding confirmed the revocation of plaintiff's passport under section 6 of the Subversive Activities Control Act. Notice of the defendant's decision was given to plaintiff by a letter from the Department of State, dated November 26, 1962.

8. The plaintiff is an historian, political scientist, editor, teacher and lecturer. He is the author of numerous published books, pamphlets and articles. He desires to travel to countries of Europe and elsewhere for study and recreation, to observe social, political and economic conditions abroad, and thereafter to write, publish, teach and lecture in this country about his observations. He also desires to travel abroad in order to attend meetings of learned societies and to fulfill invitations to lecture abroad. The defendant's revocation of plaintiff's passport has

already prevented plaintiff from accepting invitations to lecture at Humboldt University and Dresden University, [Vol. 6] both in Germany, and to attend and participate in a Congress of Historians held in Dresden, Germany, in October 1962.

9. Because of the action of the defendant in revoking his passport, plaintiff has been and is prohibited from traveling abroad as he desires. Moreover, because of the finding made by the defendant as the basis for his action, it would be futile for plaintiff to apply to the defendant for a new passport or for an extension or renewal of the passport which defendant has revoked. In addition, under sections 6 and 15 of the Subversive Activities Act and in consequence of the defendant's finding with respect to plaintiff, any such application would subject plaintiff to criminal prosecution.

10. The revocation of plaintiff's passport by defendant is unlawful in that section 6 of the Subversive Activities Control Act, upon which such revocation was based, is unconstitutional on its face and as applied to plaintiff, being (a) a deprivation without due process of law of plaintiff's constitutional liberty to travel abroad, in violation of the Fifth Amendment to the Constitution of the United States, (b) an abridgement of plaintiff's freedoms of speech, press and assembly, in violation of the First Amendment, (c) a penalty imposed on plaintiff without a judicial trial, and therefore a bill of attainder, in violation of Article I, section 9 of the Constitution, (d) a deprivation of plaintiff's right to trial by jury as required by the Fifth and Sixth Amendments and Article III, section 2, clause 3 of the Constitution, and (e) the imposition of a cruel and unusual punishment in violation of the Eighth Amendment.

11. Unless enjoined by the Court, the defendant will continue and keep in effect his revocation of plaintiff's passport and will refuse to issue or renew any passport to plaintiff.

12. The plaintiff has exhausted his administrative remedies.

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13. The plaintiff is suffering irreparable injury from defendant's action, for which he has no adequate remedy at law.

Wherefore, plaintiff prays:

(1) That a three-judge court be convened to determine [fol. 7] this controversy pursuant to sections 2282 and 2284 of 28 U.S. Code; (2) That judgment be entered (a) declaring that section 6 of the Subversive Activities Control Act is repugnant to the Constitution of the United States; (b) enjoining and restraining the defendant from enforcing and executing against the plaintiff section 6 of that Act by reason of such repugnance, from continuing in effect his revocation of plaintiff's passport, and from denying to plaintiff the issuance or renewal of a passport; (c) ordering the defendant to reissue to plaintiff a valid United States passport of standard form and duration; and (d) granting such other and further relief as may be just and appropriate.

John J. Abt, 320 Broadway, New York City, N. Y.,

Joseph Forer, 711 14th St. N.W., Washington, D.C.,
Attorneys for Plaintiff.

[fol. 11] (File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER TO COMPLAINT—Filed February 15, 1963

The Secretary of State, by his attorneys, in answer to the complaint herein filed, says:

First Defense

1. Answering Paragraph 1 of the complaint, the defendant admits that the Court has jurisdiction of this action.

2-4. The defendant admits the allegations contained in Paragraphs 2 through 4, inclusive, of the complaint.

5. Answering Paragraph 5 of the complaint, the defendant denies that the decision of the Director of the Passport Office of the Department of State on October 26, 1962, was that the revocation of plaintiff's passport was "required" under Section 6 of the Subversive Activities Control Act of 1950. In this connection, the defendant alleges that plaintiff was advised that the passport revocation action was taken by the Director of the Passport Office of the Department of [fol. 12] State on the ground that use by plaintiff of the United States passport would be in violation of Section 6 of the Act. The defendant admits the other allegations contained in Paragraph 5 of the complaint.

6. The defendant admits the allegations contained in Paragraph 6 of the complaint.

7. Answering Paragraph 7 of the complaint, the defendant denies that the action confirming the revocation of plaintiff's passport was "under" section 6 of the Subversive Activities Control Act of 1950 and alleges that such action was based on the finding that use of a United States passport by plaintiff would violate that section. The defendant admits the other allegations contained in Paragraph 7 of the complaint.

8. The defendant denies, on information and belief, the allegations contained in Paragraph 8 of the complaint and, in that connection, alleges that each and every allegation contained in said paragraph is irrelevant and immaterial to the subject matter of this action.

9. Answering Paragraph 9 of the complaint, the defendant admits that because of the action of the defendant in revoking his passport, plaintiff is prohibited from traveling to countries outside the United States for which a valid United States passport is required. The defendant also admits that absent a change in the facts which now sustain the finding made by the defendant with respect to [fol. 13] the revocation of plaintiff's passport, it would be futile for plaintiff to apply to the defendant for a new

passport or for an extension or renewal of the passport which he has revoked. The defendant denies the remaining allegations contained in Paragraph 9 of the complaint.

10. The defendant denies the allegations contained in Paragraph 10 of the complaint.

11. Answering Paragraph 11 of the complaint, the defendant admits that absent a change in the facts which caused him to take the action complained of, he will continue and keep in effect his revocation of plaintiff's passport and will refuse to issue or renew any passport to plaintiff. The defendant denies the other allegations contained in Paragraph 11 of the complaint.

12. The defendant admits the allegations contained in Paragraph 12 of the complaint.

13. The defendant denies the allegations contained in Paragraph 13 of the complaint.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

[fol. 14] Wherefore, defendant, having fully answered the allegations contained in the numbered paragraphs of the complaint, prays that the complaint herein be dismissed, with costs taxed against the plaintiff.

J. Walter Yeagley, Assistant Attorney General; Oran H. Waterman, Attorney, Department of Justice; Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D. C., Attorneys for Defendant.

[fol. 15] Certificate of Service (omitted in printing).

7

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed April 17, 1963

The plaintiff, by his attorneys, moves for summary judgment in his favor, for the reason that there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law. In support of this motion, plaintiff refers to the attached affidavits of himself and Joseph Forer.

John J. Abt, Joseph Forer, Attorneys for Plaintiff.

Certificate of service (omitted in printing).

[fol. 18] IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF HERBERT APTHEKER IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT—Filed April 17, 1963

State of New York,
County of New York, ss.:

Herbert Aptheker, being duly sworn, deposes and says as follows:

1. I am the plaintiff in the above-entitled action and make this affidavit in support of plaintiff's motion for summary judgment.

2. I was born in and I am a citizen of the United States, residing in New York City, New York. On January 1,

1962, I was the holder of the passport referred to in the complaint.

3. My principal occupations since 1938, except for the wartime period, have been and now are as an author, lecturer and editor. From 1942 to 1946, I served in the field artillery in this country and in combat in the European theatre, rising from the rank of private to major. In 1943, I received a Ph.D. in history from Columbia University.

4. I am the author of the following published books: American Negro Slave Revolts, Essays in the History of the American Negro, The Negro People in America, To Be Free: Studies in American Negro History, A Documentary History of the Negro People in the U.S., History and [Vol. 19] Reality, Toward Negro Freedom, The Truth About Hungary, The Colonial Era, The American Revolution: 1763-1783, The World of C. Wright Mills, Dare We Be Free, And Why Not Everyman, and American Foreign Policy and the Cold War. My writings are cited in the bibliographical references of scores of works, including such works as The Columbia Encyclopedia and in bibliographies published by libraries and other official bodies including the U.S. Civil Rights Commission. I have edited or contributed to several other books, including the official History of the Army Ground Forces in World War II. I am also the author of some thirty pamphlets and have contributed numerous articles and reviews to scholarly journals in the fields of history, political science and sociology, and to other periodicals. My writings are in the fields of history—primarily American—and contemporary problems. I am presently at work on a many-volumed History of the American People of which the first two volumes, mentioned above, have been published. I have lectured at many universities and colleges, including Amherst, Howard, Bennett, North Carolina College for Negroes, the University of Iowa, the University of California (at Berkeley), the University of Washington, Wesleyan University, Yale University and Portland State University, at the invitation of the insti-

tution or one of its faculty departments or of an individual professor. I also lecture frequently and regularly before public bodies, student groups, historical association meetings, unions, church groups, forums and other gatherings, and on radio programs.

5. In 1959 and 1960, in the course of travel in Europe, I lectured before the Historical Academy of the Hungarian Academy of Science and the Academy of Sciences of Poland and also at Charles University, Prague, the University of Leipzig, the University of Warsaw, the University of Berlin and Humboldt University, Berlin. In 1961, I delivered papers before the Japanese Historical Association in Tokyo and at the University of Tokyo. My [fol. 20] travels in Europe and Asia in 1959-1961 were of inestimable importance to me as a scholar, writer, lecturer and commentator because they enabled me to learn of the work being carried on there by historians and gave me invaluable first-hand impressions of the life and developments in the countries I visited. My experiences, observations and impressions from these travels were reflected in both my writings and lectures in this country.

6. In 1962, revocation of my passport prevented me from accepting invitations to attend a world gathering of historians at Dresden, Germany, and to deliver a series of lectures on the American Civil War at Humboldt University. For the same reason, I could not as planned attend an assemblage of scholars in Accra, Ghana, for a discussion of the projected Encyclopedia Africana. Moreover, the denial of my right to travel abroad has placed serious limitations on all my professional activities, my ability to pursue scholarly research, my opportunity to exchange opinions with fellow scholars in my fields of specialization, and the possibility of gathering material abroad for writing and lecturing. Among other things, the denial of access to overseas archives and depositories—particularly in England and France—places formidable obstacles in the way of the continuation of my work on The History of the American People.

7. I desire to and, if permitted, will travel to Europe and elsewhere to pursue my historical studies, attend

meetings of learned societies and scholars, exchange opinions with fellow historians, lecture at foreign universities, and observe conditions and gather material for my writing and lecturing in this country.

Herbert Aptheker

Subscribed and sworn to before me this 16 day of April, 1963.

Carl Brodsky

[fol. 21]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF JOSEPH FORER IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT—Filed April 17, 1963

District of Columbia, ss.:

Joseph Forer, being duly sworn, deposes and says:

1. I am one of the plaintiff's attorneys in the above-captioned case. I represented plaintiff in the administrative proceedings in the Department of State which reviewed the revocation of plaintiff's passport, referred to in paragraphs 5, 6 and 7 of the complaint.

2. Attached hereto, marked Exhibit A, is a true copy of the letter of January 22, 1962, from the Acting Director of the Passport Office, referred to in paragraph 4 of the complaint.

3. Attached hereto, marked Exhibit B, is a true copy of the decision, dated October 26, 1962, of the Director of the Passport Office, referred to in paragraph 5 of the complaint.

4. Attached hereto, marked Exhibit C, is a true copy of the letter from the Department of State, dated November 26, 1962, referred to in paragraph 7 of the complaint.

Joseph Forer

Subscribed and sworn to before me this 15th day of April, 1963.

Mary E. Rosenthal, Notary Public

My Commission Expires August 31, 1964

[fol. 22]

[File endorsement omitted]

EXHIBIT A TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTON

ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25, D. C.

[EMBLEM]

In reply refer to
PT/LS

REGISTERED MAIL

RETURN RECEIPT REQUESTED

Jan. 22, 1962

Dear Mr. Aptheker:

By direction of the Secretary of State you are hereby informed that your United States Passport No. 1273187 issued on December 10, 1958 and renewed on March 21, 1961 has been revoked. This action is taken because the Department believes that use by you of a United States Passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 U.S.C. Sec. 785.

You are requested to surrender your passport at your earliest convenience and in any event no later than 30 days

from the date of this letter by delivering it to the Passport Agency nearest you or by sending it certified mail to the Passport Office, Department of State, Washington, D. C.

In the event you wish to secure a review of the decision revoking your passport, you are hereby advised of your rights in accordance with the Regulations of the Department of State 22 C.F.R. 51.135-170. A copy of these regulations is enclosed.

Sincerely,

/s/ EDWARD J. HICKEY

Edward J. Hickey

Acting Director, Passport Office

Enclosure:

Supplement to Passport
Regulations

Mr. Herbert Aptheker,
32 Ludlam Place,
Brooklyn 25, New York.

[fol. 23]

[File endorsement omitted]

EXHIBIT B TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTON

ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25, D. C.

[EMBLEM]

In reply refer to
PT/LS 130-Aptheker, Herbert Eugene

Oct. 26, 1962

Dear Dr. Aptheker:

In a letter dated January 22, 1962, the Acting Director, Passport Office, informed you that your passport had been revoked on the ground that use by you of a United States

Dr. Herbert Aptheker,
32 Ludlam Place,
Brooklyn 25, N. Y.

passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 United States Code, Section 785. You were also advised of your right to seek review of this action in accordance with the provisions of Sections 51.135 through 51.170 of the Passport Regulations, Title 22, Code of Federal Regulations.

A hearing was held in the Passport Office on June 26, 1962. While you did not attend the hearing, you were represented by your attorney, Mr. Joseph Forer, and you were also afforded the opportunity to present evidence.

On October 15, 1962, the Hearing Officer submitted his recommended decision to the Director, Passport Office. At the same time a copy of this decision was sent to your attorney. The Hearing Officer concluded that on the basis of the evidence of record the Department of State had reason to believe that you were within the purview of Section 6 (a) (2) of the Subversive Activities Control Act of 1950, as amended (50 U.S.C. 785), and as a result thereof your use of a passport would be in violation of the law. He, therefore, recommended that the revocation of your passport be made final.

I have studied the record of the hearing of June 26, 1962, as well as the recommended decision of the Hearing Officer. I have reached the conclusion that the evidence establishes that at all times material to this proceeding you were a member of the Communist Party of the United States of [fol. 24] America, and that the revocation of your passport is justified under applicable statutes and regulations. I, therefore, affirm the action taken on January 22, 1962, revoking your passport.

In the light of the foregoing, you are again requested to surrender Passport No. 1273187 issued to you on December 10, 1958, and renewed on March 21, 1961, by delivering it to the nearest Passport Agency or by sending it to the Passport Office, Department of State, Washington 25, D. C.

In accordance with the provisions of Section 51.139 of the Passport Regulations you are entitled to appeal this decision to the Board of Passport Appeals. A reprint from the

Federal Register of January 12, 1962, setting forth the pertinent provisions of the Passport Regulations is enclosed for your information. The Board is located in Room 6224, State Department Building, Washington 25, D. C.

A copy of this letter is being sent to Mr. Forer.

Sincerely,

/s/ K

Frances G. Knight
Director, Passport Office

Enclosure:

Extract Passport Regulations.

cc: Mr. Joseph Forer.

[fol. 25]

[File endorsement omitted]

EXHIBIT C TO AFFIDAVIT

Nov. 26, 1962

Dear Dr. Aptheker:

By letter of January 22, 1962, the Acting Director, Passport Office, informed you that United States Passport No. 1273187 issued on December 10, 1958 and renewed on March 21, 1961 had been revoked. You were advised that the action was taken on the grounds that use by you of a United States passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 U.S.C. Sec. 785.

By letter from your attorney dated February 19, 1962, you requested a review of the revocation of your passport. Accordingly, a hearing was held on June 26, 1962 in accordance with the applicable regulations of the Department. The Hearing Officer, in a decision dated October 15, 1962 concluded, on the basis of the evidence adduced at the hearing, that "the Department of State had reason to believe that Dr. Herbert Eugene Aptheker is within the purview of Sec. 6(a)(2) of the Subversive Activities Control Act, and as a result thereof his use of a passport would be in violation of the law." On the basis of this conclusion, the Hearing Officer recommended that the decision to revoke your passport be confirmed.

On October 26, 1962, you were informed by letter from Miss Frances G. Knight, Director, Passport Office, that the decision to revoke your passport had been confirmed, on the basis of the conclusion reached by the Hearing Office, and on the basis of a review of the hearing. You were also advised of your right to appeal the decision to the Board of Passport Appeals, in accordance with the regulations of the Department. By letter of October 29, 1962 from your attorney, you requested a hearing before the Board of Passport Appeals, and a hearing was held before the Board on November 13, 1962. The Board, after full examination of the record and after hearing arguments of counsel, found that "there is a preponderance of evidence in the record to show that at all material times Herbert Eugene Aptheker was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Board." The Board stated

Dr. Herbert Aptheker,
32 Ludlam Place,
Brooklyn 25, New York.

[fol. 25a] that in making this determination it did not take into consideration any confidential security information not part of the record. The Board recommended, on the basis of the evidence on the record, that the decision of the Passport Office to revoke your passport should be affirmed.

The Secretary approved the recommendation of the Board of Passport Appeals on November 23, 1962, and specifically adopted as his own the finding of fact that at all material times you were a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act. In so doing, the Secretary relied solely on the evidence in the record. The Secretary has directed me to communicate this information to you, and this letter shall be considered to be the notice of decision in accordance with 22 CFR Sec. 51.167.

You are accordingly advised that the revocation of Passport No. 1273187 issued to you on December 10, 1958 and renewed on March 21, 1961 has been confirmed, and that there is no further procedure in the Department of State for review of this action. You are requested to surrender your passport by delivering it to the Passport Agency nearest you or by sending it to the Passport Office, Department of State, Washington 25, D. C.

Sincerely yours,

William H. Orrick, Jr.
Deputy Under Secretary
for Administration

cc: Mr. Joseph Forer, Esq.

L:AFLowenfeld:epj
11/26/62

[fol. 26]

[Filed endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 3478-62

ELIZABETH GURLEY FLYNN, 222 West 23rd St.,
New York City, N. Y., Plaintiff,

v.

THE SECRETARY OF STATE, Department of State,
Washington, D. C., Defendant.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FROM
REVOCATION OF PASSPORT—Filed November 6, 1962

The plaintiff, Elizabeth Gurley Flynn, by her attorneys, complaining of the defendant, The Secretary of State of the United States, alleges:

1. The Court has jurisdiction of this action under sections 11-305 and 11-306 of the District of Columbia Code;

sections 2201, 2282 and 2284 of 28 U. S. Code; and section 10 of the Administrative Procedure Act, 5 U. S. Code section 1009.

2. The plaintiff was born in the United States of America. She is now, and has at all times been since birth, a citizen of the United States of America.

3. On January 21, 1962, the plaintiff was the holder of a United States passport issued by the defendant.

4. On January 22, 1962, the Acting Director of the Passport Office of the Department of State notified the plaintiff that by direction of the defendant the plaintiff's passport was revoked because the Department of State believed that use by plaintiff of a United States passport would be in violation of section 6 of the Subversive Activities Control Act, 50 U. S. Code, section 785.

5. Thereafter, at the request of the plaintiff and pursuant to regulations issued by the defendant, an administrative hearing was held in the Department of State to review the revocation of plaintiff's passport. The hearing culminated in a decision, dated July 17, 1962, by the Director of the Passport Office of the Department of State that the revocation of plaintiff's passport was required under section 6 of the Subversive Activities Control Act.

[fol. 27] 6. Pursuant to regulations of the defendant, the plaintiff appealed the decision of the Director of the Passport Office to the Board of Passport Appeals of the Department of State. Following a hearing before the Board, the Board found that "there is a preponderance of evidence in the record to show that at all material times [the plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act." On the basis of this finding, the Board recommended to the defendant that he affirm the decision of the Passport Office to revoke plaintiff's passport.

7. On or about October 18, 1962, the defendant approved the recommendation of the Board of Passport Appeals.

specifically adopted as his own the above-quoted finding of the Board, and on the basis of that finding confirmed the revocation of plaintiff's passport under section 6 of the Subversive Activities Control Act. Notice of the defendant's decision was given to plaintiff by a letter from the Department of State, dated October 23, 1962.

8. The plaintiff desires to travel to countries of Europe and elsewhere for recreation and study, to observe social, political and economic conditions abroad, and thereafter to write, publish and lecture about her observations.

9. Because of the action of the defendant in revoking her passport, plaintiff is prohibited from traveling abroad as she desires. Moreover, because of the finding made by the defendant as the basis for his action, it would be futile for plaintiff to apply to the defendant for a new passport or for an extension or renewal of the passport which he has revoked. In addition, under sections 6 and 15 of the Subversive Activities Act and in consequence of the defendant's finding with respect to plaintiff, any such application would subject plaintiff to criminal prosecution.

10. The revocation of plaintiff's passport by defendant is unlawful in that section 6 of the Subversive Activities Control Act, upon which such revocation was based, is unconstitutional on its face and as applied to plaintiff, being (a) a deprivation without due process of law of plaintiff's constitutional liberty to travel abroad, in violation of the [fol. 28] Fifth Amendment to the Constitution of the United States, (b) an abridgement of plaintiff's freedoms of speech, press and assembly, in violation of the First Amendment, (c) a penalty imposed on plaintiff without a judicial trial, and therefore a bill of attainder, in violation of Article I, section 9 of the Constitution, (d) a deprivation of plaintiff's right to trial by jury as required by the Fifth and Sixth Amendments and Article III, section 2, clause 3 of the Constitution, and (e) the imposition of a cruel and unusual punishment in violation of the Eighth Amendment.

11. Unless enjoined by the Court, the defendant will continue and keep in effect his revocation of plaintiff's

passport and will refuse to issue or renew any passport to plaintiff.

12. The plaintiff has exhausted her administrative remedies.

13. The plaintiff is suffering irreparable injury from defendant's action, for which she has no adequate remedy at law.

Wherefore, plaintiff prays:

(1) That a three-judge court be convened to determine this controversy pursuant to sections 2282 and 2284 of 28 U. S. Code; (2) That judgment be entered (a) declaring that section 6 of the Subversive Activities Control Act is repugnant to the Constitution of the United States; (b) ~~enjoining and restraining the defendant from enforcing and executing against the plaintiff section 6 of that Act by reason of such repugnance, from continuing in effect his revocation of plaintiff's passport, and from denying to plaintiff the issuance or renewal of a passport;~~ (c) ordering the defendant to reissue to plaintiff a valid United States passport of standard form and duration; and (d) granting such other and further relief as may be just and appropriate.

John J. Abt, 320 Broadway, New York City, N. Y.;

Joseph Forer, 711 14th St. N.W., Washington, D.C.,
Attorneys for Plaintiff.

[fol. 29]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER TO COMPLAINT—Filed February 4, 1963

The Secretary of State, by his attorneys, in answer to the
complaint herein filed, says:

First Defense

1. Answering Paragraph 1 of the complaint, the defendant admits that the Court has jurisdiction of this action.

2-4. The defendant admits the allegations contained in Paragraphs 2 through 4, inclusive, of the complaint.

5. Answering Paragraph 5 of the complaint, the defendant denies that the decision of the Director of the Passport Office of the Department of State on July 17, 1962, was that the revocation of plaintiff's passport was "required" under Section 6 of the Subversive Activities Control Act of 1950. In this connection, the defendant alleges that plaintiff was advised that the passport revocation action was taken by the Director of the Passport Office of the Department of State on the ground that use by plaintiffs of a United States passport would be in violation of Section 6 of the Act. The defendant admits the other allegations contained in Paragraph 5 of the complaint.

6. The defendant admits the allegations contained in Paragraph 6 of the complaint.

7. Answering Paragraph 7 of the complaint, the defendant denies that the action confirming the revocation of plaintiff's passport was "under" Section 6 of the Subversive Activities Control Act of 1950 and alleges that such action was based on the finding that use of a United States passport by plaintiff would violate that section. The de-

defendant admits the other allegations contained in Paragraph 7 of the complaint.

8. The defendant, on information and belief, denies the allegations contained in Paragraph 8 of the complaint and, in that connection, alleges that each and every allegation contained in said paragraph is irrelevant and immaterial to the subject matter of this action.

9. Answering Paragraph 9 of the complaint, the defendant admits that because of the action of the defendant in revoking her passport, plaintiff is prohibited from traveling to countries outside the United States for which a valid United States passport is required. The defendant also admits that absent a change in the facts which now sustain the finding made by the defendant with respect to the revocation of plaintiff's passport, it would be futile for [fol. 31] plaintiff to apply to the defendant for a new passport or for an extension or renewal of the passport which he has revoked. The defendant denies the remaining allegations contained in Paragraph 9 of the complaint.

10. The defendant denies the allegations contained in Paragraph 10 of the complaint.

11. Answering Paragraph 11 of the complaint, the defendant admits that absent a change in the facts which caused him to take the action complained of, he will continue and keep in effect his revocation of plaintiff's passport and will refuse to issue or renew any passport to plaintiff. The defendant denies the other allegations contained in Paragraph 11 of the complaint.

12. The defendant admits the allegations contained in Paragraph 12 of the complaint.

13. The defendant denies the allegations contained in Paragraph 13 of the complaint.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

[fol. 32] Wherefore, defendant, having fully answered the allegations contained in the numbered paragraphs of the complaint, prays that the complaint herein be dismissed, with costs taxed against the plaintiff.

J. Walter Yeagley, Assistant Attorney General;
Oran H. Waterman, Attorney, Department of Justice;
Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D.C., Attorneys
for Defendant.

[fol. 33] Certificate of Service (omitted in printing).

[fol. 34] [File-endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed April 17, 1963

The plaintiff, by her attorneys, moves for summary judgment in her favor, for the reason that there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law. In support of this motion, plaintiff refers to the attached affidavits of herself and Joseph Forer.

John J. Abt; Joseph Forer, Attorneys for Plaintiff.
Certificate of Service (omitted in printing).

[fol. 35]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF ELIZABETH GURLEY FLYNN IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed April 17, 1963

State of New York,
County of Bronx, ss.:

Elizabeth Gurley Flynn, being duly sworn, deposes and says as follows:

1. I am the plaintiff in the above-entitled action and make this affidavit in support of plaintiff's motion for summary judgment.

2. I was born in and I am a citizen of the United States, residing in New York City, New York. On January 21, 1962, I was the holder of the United States passport referred to in the complaint.

3. A substantial part of my time is spent in writing and lecturing. For many years, I have written a weekly column for the newspaper, The Worker. I am the author of two books, I Speak My Own Piece, the first volume of a planned two volume autobiography, and the recently published The Alderson Story. I do a great deal of public speaking and lecturing from coast to coast in this country before various audiences, including women's, student and political groups and organizations. I participate in forum [fol. 36] discussions and, in my travels around the country, appear on radio and TV programs.

4. My writing and public speaking is on a variety of subjects, including the labor movement, problems of women and young people, international relations, domestic and foreign political developments, and questions relating to socialism.

5. Since 1945, I have made a number of trips to Europe where I have visited England, France, Denmark and a number of the socialist countries including the Soviet Union. I wrote about my observations and experiences in my Worker column both during my sojourns abroad and after I returned home. I also made use of the material I gathered abroad in several hundred speaking engagements in this country. In the course of my European travels, I spoke before groups of women, students and workers in the various countries that I visited on developments in the United States.

6. It is my desire and intention to travel to Europe again for the purpose of rest and recreation, to gather additional current material for my writing and speaking, and—as in the past—to speak to European audiences about the activities of the American people, particularly in the labor movement and on the question of peace. Also, I am about to start work on the second volume of my autobiography which will cover the period from 1926 to date. In that connection, I find it necessary to revisit Europe for the purpose of refreshing my memory of people and places and to obtain first-hand impressions of current conditions.

[fol. 37] 7. It is my earnest belief that my writing and speaking here and abroad has made a modest but not altogether unimportant contribution to the mutual understanding between peoples—and particularly between the American people and the people of the socialist countries—which alone can provide the basis for friendship and peace.

Elizabeth Gurlé Flynn

Subscribed and sworn to before me this 12th day of April, 1963.

Milton Pard

Notary Public, State of New York
No. 03-5177625 Qua. in Bronx County,
Commission Expires March 30, 1964

[fol. 38]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF JOSEPH FORER IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT—Filed April 17, 1963

District of Columbia, ss:

Joseph Forer, being duly sworn, deposes and says:

1. I am one of the plaintiff's attorneys in the above-captioned case. I represented plaintiff in the administrative proceedings in the Department of State which reviewed the revocation of plaintiff's passport, referred to in paragraphs 5, 6 and 7 of the complaint.

2. Attached hereto, marked Exhibit A, is a true copy of the letter of January 22, 1962, from the Acting Director of the Passport Office, referred to in paragraph 4 of the complaint.

3. Attached hereto, marked Exhibit B, is a true copy of the decision, dated July 17, 1962, of the Director of the Passport Office, referred to in paragraph 5 of the complaint.

4. Attached hereto, marked Exhibit C, is a true copy of the letter from the Department of State, dated October 23, 1962, referred to in paragraph 7 of the complaint.

5. Attached hereto, marked Exhibit D, is a true copy of a letter dated October 29, 1962, received by me from the Counsel of the Board of Passport Appeals, correcting a typographical omission from the letter referred to in paragraph 4 hereof.

Joseph Forer

Subscribed and sworn to before me this 15th day of April, 1963.

Mary E. Rosenthal, Notary Public. My Commission
Expires August 31, 1964.

26

[fol. 39]

[File endorsement omitted]

EXHIBIT A TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTON

ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON, 25, D.C.

[Emblem]

In reply refer to
PT/LS

REGISTERED MAIL
RETURN RECEIPT REQUESTED

JAN 22 1962

Dear Mrs. Flynn:

By direction of the Secretary of State you are hereby informed that your United States Passport No. 2016926 issued on March 10, 1960 has been revoked. This action is taken because the Department believes that use by you of a United States Passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 U.S.C. Sec. 785.

You are requested to surrender your passport at your earliest convenience and in any event no later than 30 days from the date of this letter by delivering it to the Passport Agency nearest you or by sending it certified mail to the Passport Office, Department of State, Washington, D.C.

In the event you wish to secure a review of the decision revoking your passport, you are hereby advised of your rights in accordance with the Regulations of the Department of State 22 C.F.R. 31.135-170. A copy of these regulations is enclosed.

Sincerely,

/s/ EDWARD J. HICKEY
Edward J. Hickey

Acting Director, Passport Office

Enclosure:

Supplement to Passport
Regulations

Mrs. Elizabeth G. Flynn,
224 East 12th Street,
New York 3, New York.

[fol. 40]

[File endorsement omitted]

Copy for Mr. Joseph Forer

EXHIBIT B TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTONADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON, D. C.

(Emblem)

In reply refer to
PT/LS 130—Flynn, Elizabeth Gurley

Jul 17 1962

Dear Mrs. Flynn:

By letter of January 22, 1962, the Acting Director, Passport Office, informed you that United States Passport No. 2016926, which was issued to you on March 10, 1960, had been revoked. You were advised of your right to seek review of this action in accordance with the Regulations of the Department of State, Title 22 Code of Federal Regulations 51.135 through 51.170.

By letter of February 16, 1962, your attorney, Mr. Joseph Forer, applied for a review of the revocation of your passport. A hearing was held in the Department of State on April 24 and May 3, 1962. The hearing was presided over by Mr. Max L. Kane, Hearing Officer, and a transcript was made of the proceedings. Both you and the Passport Office were represented by counsel and were accorded opportunity to present evidence. All witnesses were subjected to cross-examination and testimony was under oath. The Hearing Officer, upon completion of the hearing, submitted his recommended decision, a copy of which was furnished your attorney. He concluded that the evidence adduced at the hearing clearly established that at all the material times you were an active, participating, and continuous member of the Communist Party of the United States of America; that by such membership you had forfeited your right to use a United States Passport under the applicable law; and that the administrative

action revoking your passport was clearly sustained by the record.

I have studied the transcript of the hearing of April 24 and May 3, 1962, including the evidence entered into the record thereof as well as the recommended decision of the Hearing Officer. I have reached the conclusion that the action to revoke your passport was in accordance with law, and that no change, correction, or modification is warranted. In arriving at this decision I have considered only the testimony and evidence presented at the hearing.

Mrs. Elizabeth Gurley Flynn,
• 224 East 12th Street,
New York 3, New York.

[fol. 41] In view of the foregoing, you are hereby advised and informed that the United States Passport No. 2016926, issued to you on March 10, 1960, has been revoked. You are requested to surrender said passport immediately by delivering it to the Passport Agency nearest you or by sending it to the Passport Office, Department of State, Washington 25, D. C. You are further advised that you are entitled to appeal this decision in accordance with the provisions of Title 22 Code of Federal Regulations 51.139 which reads as follows:

"In the event of a decision adverse to the applicant, he shall be entitled within thirty days after receipt of notice of such decision to appeal his case to the Board of Passport Appeals provided for in 51.150."

Any appeal must be in writing and may be delivered personally, by registered mail, or by leaving a copy at the office of the Board of Passport Appeals, Room 6224, State Department Building, Washington, D. C.

By copy of this letter your attorney is advised of this decision.

Sincerely,

/s/ FGK

Frances G. Knight
Director, Passport Office

[fol. 42]

[File endorsement omitted]

EXHIBIT C TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTONADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25, D. C.

[Emblem]

Oct 23 1962

Dear Mrs. Flynn:

By letter of January 22, 1962, the Acting Director, Passport Office, informed you that United States Passport No. 2016926 which was issued to you on March 10, 1960 has been revoked. You were advised that the action was taken on the grounds that use by you of a United States passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 U.S.C. Sec. 785.

By letter from your attorney dated February 16, 1962, you requested a review of the revocation of your passport, and a hearing was held on April 24 and May 3, 1962 in accordance with the applicable regulations of the Department. The Hearing Officer in a decision dated June 18, 1962 concluded that "the evidence adduced at the hearing clearly establishes that at all the times material in this proceeding, petitioner was an active, participating and continuous member of the Communist Party of the United States." On the basis of this conclusion, the Hearing Officer recommended that the decision to revoke your passport be confirmed.

On July 17, 1962, you were informed by letter from Miss Frances G. Knight, Director, Passport Office, that the decision to revoke your passport had been confirmed, on the basis on the conclusion reached by the Hearing Officer, and on the basis of a review of the record of the hearing. The Board, after full examination of the record and after hearing arguments of counsel, found that "there is a preponderance of evidence in the record to show that at all mate-

rial times Mrs. Flynn was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act." The Board stated that in making this determination it did not take into consideration any confidential security information not part of the record. The Board recommended, on the basis of the evidence on the record, that the decision of the Passport Office to revoke your passport should be affirmed.

Mrs. Elizabeth Gurley Flynn,
224 East 12th Street,
New York 3, New York.

[fol. 43] The Secretary approved the recommendation of the Board of Passport Appeals on October 18, 1962, and specifically adopted as his own the finding of fact that "at all material times you were a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act." In so doing, the Secretary relied solely on the evidence in the record. The Secretary has directed me to communicate this information to you and this letter shall be considered to be the notice of decision in accordance with 22 CFR Sec. 51.167.

You are accordingly advised that the revocation of Passport No. 2016926 issued to you on March 10, 1960 has been confirmed, and that there is no further procedure in the Department of State for review of this action. You are requested to surrender your passport by delivering it to the Passport Agency nearest you or by sending it to the Passport Office, Department of State, Washington 25, D.C.

Sincerely yours,

/s/ WILLIAM H. ORRICK, JR.
William H. Orrick, Jr.
Deputy Under Secretary
for Administration

cc: Mr. Joseph Forer, Esq.,

[fol. 44]

[File endorsement omitted]

EXHIBIT D TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTONADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25, D. C.

[Emblem]

October 29, 1962.

Dear Mr. Forer:

I have just seen the letter of October 23, 1962 from the Deputy Under Secretary for Administration to Mrs. Elizabeth Gurley Flynn concerning the revocation of Mrs. Flynn's passport. You will understand, of course, that "the Board" referred to in the third paragraph of the Under Secretary's letter is the Board of Passport Appeals. A sentence apparently was inadvertently omitted from that paragraph stating the fact that you had appealed the decision of the Passport Office to the Board of Passport Appeals and that the Board had held a hearing on October 11, 1962.

In view of that omission I thought it desirable to send you this brief note for the record.

Sincerely yours,

/s/ CARL F. SALANS
Carl F. Salans
Counsel

Board of Passport Appeals

Joseph Forer, Esquire,
711-14th Street, N. W.,
Washington 5, D. C.

[fol. 45]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Titles omitted]

ORDER OF CONSOLIDATION—Filed April 29, 1963

On consent of the parties, and it appearing that these actions involve common questions of law, it is by the Court, this 29th day of April, 1963,

Ordered, That the above-captioned actions be, and they hereby are, consolidated pursuant to Rule 42(a), Federal Rules of Civil Procedure.

Joseph C. McGarraghy, Judge.

Consented to:

Joseph Forer, Attorney for Plaintiffs.

Benjamin C. Flannagan, Attorney, Department of Justice, Attorney for Defendant.

[fol. 46]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Titles omitted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—
Filed May 28, 1963

Now comes the defendant, the Secretary of State, by his attorneys, and respectfully moves this Honorable Court for summary judgment under Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law.

In support of this motion the Court's attention is respectfully invited to the affidavit of Frances G. Knight and to the defendant's memorandum of points and authorities in [fol. 47] support on his motion for summary judgment and in opposition to plaintiffs' motions for summary judgment, both attached hereto.

A separate Statement of Material Facts is also filed herewith.

J. Walter Yeagley, Assistant Attorney General, Oran H. Waterman, Attorney, Department of Justice, Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D. C., Attorneys for Defendant.

[fol. 48]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Titles omitted]

STATEMENT OF MATERIAL FACTS—Filed May 28, 1963

Introduction

The plaintiff Elizabeth Gurley Flynn is publicly well-known to be the current National Chairman of the Communist Party of the United States of America. See Exhibit 103 to Knight Affidavit. The plaintiff Herbert Eugene Aptheker is equally publicly well-known to be the present Editor of *Political Affairs*, the self-described "theoretical organ of the Communist Party" of the United States of America. Exhibit 202 to Knight Affidavit, pages A-54-A-57. Both plaintiffs testified as witnesses for the Communist Party, U.S.A. in the registration proceeding before the Subversive Activities Control Board styled *Attorney General v. Communist Party, U.S.A.*, Docket No. 51-101, which registration order was affirmed by the Supreme Court in *Communist Party v. Control Board*, 367 U.S. 1 (1961). Exhibit 101 to Knight Affidavit, pages A-17-A-20; Exhibit 202 to Knight Affidavit, page A-34. Plaintiffs' long history of

[iol. 49] activity in the Communist Party, U.S.A. was thoroughly established at their hearings. Exhibits 101 and 202 to Knight Affidavit. With respect to the plaintiff Flynn the hearing officer stated, Exhibit 103 to Knight Affidavit:

"The evidence adduced at the hearing clearly establishes that at all times material in this proceeding, petitioner [Flynn] was an active, participating and continuous member of the Communist Party of the United States; was active in the Party's affairs and its organization; and indeed was and still is one of its principal officials."

With respect to the plaintiff Aptheker the hearing officer stated, Exhibit 203 to Knight Affidavit:

"An examination of the documentary evidence submitted by the Department of State, which evidence was used to reach a decision that Petitioner's [Aptheker's] passport should be revoked, is more than sufficient to reach this determination. In fact, the Petitioner [Aptheker] makes it quite clear in his own words that he has been a member of the Communist Party since 1939 and that he is very proud of this association and will do whatever he can to further the aims and goals of the Party."

Mrs. Elizabeth Gurley Flynn

1. On December 30, 1939 Mrs. Flynn applied for a passport. A copy of her application is attached as Exhibit 100 to the Knight Affidavit.

2. On March 10, 1960 Mrs. Flynn was issued a United States Passport. Knight Affidavit, Paragraph 3.

3. On January 22, 1962 the Acting Director of the Passport Office of the Department of State notified Mrs. Flynn that by direction of the Secretary of State her passport was revoked because the Department of State believed that use by Mrs. Flynn of a United States Passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785. Complaint, Paragraph 4; Exhibit A to Forer Affidavit.

[fol. 50] 4. Thereafter at the request of Mrs. Flynn and pursuant to Section 51.135 et seq. of the Passport Regulations, 22 C.F.R., on April 24 and May 3, 1962, Mrs. Flynn was accorded an administrative hearing to review the revocation of her passport. Complaint, Paragraph 5; Transcript of Proceedings attached as Exhibits 101 and 102 to the Knight Affidavit.

5. The hearing examiner, Mr. Max L. Kane, on June 18, 1962, recommended that the Director of the Passport Office sustain the revocation of Mrs. Flynn's passport. Exhibit 103 to the Knight Affidavit.

6. On July 17, 1962 the Director of the Passport Office concluded that the action revoking Mrs. Flynn's passport was in accordance with law and notified Mrs. Flynn of her appeal rights. Exhibit B to Forer Affidavit.

7. Thereafter on October 11, 1962 Mrs. Flynn was accorded a hearing before the Board of Passport Appeals. Complaint, Paragraph 6; Transcript of Proceedings attached as Exhibit 104 to Knight Affidavit.

8. The Board of Passport Appeals found that "there is a preponderance of evidence in the record to show that at all material times Mrs. Flynn was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act [of 1950, 50 U.S.C. 781 et seq.]". Complaint, Paragraph 6.

9. On October 18, the Secretary of State approved the recommendation of the Board of Passport Appeals, specifically adopting as his own the above-quoted finding of [fol. 51] the Board, and on the basis of that finding confirmed the revocation of Mrs. Flynn's passport on the ground that use of a United States Passport by Mrs. Flynn would violate Section 6 of the 1950 Act. Complaint and Answer, Paragraph 7.

10. Notice of the decision of the Secretary of State was given to Mrs. Flynn by a letter from the Department of

State dated October 23, 1962. Complaint, Paragraph 7; Exhibit C to Forer Affidavit.

11. Mrs. Flynn filed this civil action on November 6, 1962.

12. Mrs. Flynn's passport expired on March 9, 1963. Knight Affidavit, Paragraph 13.

13. Mrs. Flynn has not applied for the two-year renewal of her passport. Knight Affidavit, Paragraph 14.

Herbert Eugene Aptheker

1. On December 5, 1958, Aptheker applied for a passport. A copy of his application is attached as Exhibit 200 to the Knight Affidavit.

2. On December 10, 1958 Aptheker was issued a passport. Knight Affidavit, Paragraph 17.

3. On December 9, 1960 Aptheker's passport expired. Knight Affidavit, Paragraph 18.

4. On March 3, 1961 Aptheker applied for the renewal of his passport. A copy of his renewal application is attached as Exhibit 201 to the Knight Affidavit.

5. On March 21, 1961, Aptheker's passport was renewed. Knight Affidavit, Paragraph 20.

[fol. 52] 6. On January 22, 1962 the Acting Director of the Passport Office of the Department of State notified Aptheker that by direction of the Secretary of State his passport was revoked because the Department of State believed that use by him of a United States Passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785. Complaint, Paragraph 4; Exhibit A to Forer Affidavit.

7. Thereafter at Aptheker's request and pursuant to Section 51.135 et seq. of the Passport Regulations, 22 C.F.R., on June 26, 1962, Aptheker was accorded an administra-

tive hearing to review the revocation of his passport. Complaint, Paragraph 5; Transcript of Proceedings attached as Exhibit 202 to Knight Affidavit.

8. The hearing examiner, Mr. Raymond J. Lynch, on October 15, 1962 recommended that the Director of the Passport Office sustain the revocation of Aptheker's passport. Exhibit 203 to Knight Affidavit.

9. On October 26, 1962 the Director of the Passport Office concluded that the action revoking Aptheker's passport was in accordance with law and notified Aptheker of his appeal rights. Exhibit B to Forer Affidavit.

10. Thereafter on November 13, 1962 Aptheker was accorded a hearing before the Board of Passport Appeals. Complaint, Paragraph 6; Transcript of Proceedings attached as Exhibit 204 to Knight Affidavit.

11. The Board of Passport Appeals found that "there is a preponderance of evidence in the record to show that at all material times [Aptheker] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act [of 1950, 50 U.S.C. 781 *et seq.*]." Complaint, Paragraph 6.

[fol. 53] 12. On November 23, 1962 the Secretary of State approved the recommendation of the Board of Passport Appeals, specifically adopting as his own the above-quoted finding of the Board, and on the basis of that finding confirmed the revocation of Aptheker's passport on the ground that use of a United States Passport by Aptheker would violate Section 6 of the 1950 Act. Complaint and Answer, Paragraph 7.

13. Notice of the decision of the Secretary of State was given to Aptheker by a letter from the Department of State dated November 26, 1962. Complaint, Paragraph 7; Exhibit C to Forer Affidavit.

14. Aptheker's passport expired on December 9, 1962 and is not subject to renewal. Knight Affidavit, Paragraphs 17, 20 and 29.

15. Aptheker has not applied for a new passport, Knight Affidavit, Paragraph 30.

16. Aptheker filed this civil action on December 14, 1962.

J. Walter Yeagley, Assistant Attorney General;
Oran H. Waterman, Attorney, Department of Justice;

Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D. C.; Attorneys for the Defendant.

[fol. 54]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF FRANCES G. KNIGHT—Filed May 28, 1963

City of Washington,
District of Columbia, ss.

Frances G. Knight, being duly sworn, deposes and says:

1. That on May 1, 1955, she was duly appointed as the Director of the Passport Office of the Department of State, that she has continued to serve as the Director since that time, and that she has personal knowledge of the matters related in this affidavit.

2. That on December 30, 1959, Mrs. Elizabeth Gurley Flynn applied for a passport. A copy of her application is attached hereto as Exhibit 100;

3. That on March 10, 1960, Mrs. Flynn was issued a United States passport valid for a period of three years and susceptible of renewal for an additional two year period (22 USC 217a, as amended by Public Law 86-267) (78 Stat. 552);

[fol. 55] 4. That on January 22, 1962, the Acting Director of the Passport Office of the Department of State notified Mrs. Flynn that by direction of the Secretary of State her passport had been revoked because the Department of State believed that use by her of a United States Passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785;

5. That thereafter on April 24 and May 3, 1962, at the request of Mrs. Flynn and pursuant to Section 51.135 *et seq.* of Title 22 of the Code of Federal Regulations, Mrs. Flynn was accorded an administrative hearing to review the revocation of her passport. The Transcripts of Proceedings are attached hereto as Exhibits 101 and 102;

6. That on June 18, 1962, the hearing examiner, Mr. Max L. Kane, submitted findings which sustained the action of the Director of the Passport Office in revoking Mrs. Flynn's passport. His report is attached hereto as Exhibit 103;

7. That on July 17, 1962, the Director of the Passport Office, having studied the transcripts of the hearing of April 24 and May 3, 1962, and the hearing examiner's report, concluded that the action revoking Mrs. Flynn's passport was in accordance with law and notified Mrs. Flynn of her appeal rights;

8. That thereafter on October 11, 1962, Mrs. Flynn was accorded a hearing before the Board of Passport Appeals. The Transcript of Proceedings is attached hereto as Exhibit 104;

9. That the Board of Passport Appeals found that "there is a preponderance of evidence in the record to show that at all material times [Mrs. Flynn] was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act [of 1950, 50 U.S.C. 781 *et seq.*];"

[fol. 56] 10. That on October 18, 1962, the Secretary of State approved the recommendation of the Board of Pass-

port Appeals, specifically adopting as his own the above-quoted finding of the Board, and, on the basis of that finding reaffirmed the revocation of Mrs. Flynn's passport on the ground that her use of a United States passport would violate Section 6 of the 1950 Act;

11. That notice of the decision of the Secretary of State was given to Mrs. Flynn by a letter from the Department of State dated October 23, 1962;

12. That Mrs. Flynn filed this civil action on November 6, 1962;

13. That Mrs. Flynn's passport expired on March 9, 1963;

14-15. That Mrs. Flynn has not applied for renewal of her passport;

16. That on December 9, 1958, Herbert Eugene Aptheker applied for a passport. A copy of his application is attached hereto as Exhibit 200;

17. That on December 10, 1958, Aptheker was issued a United States passport valid for a period of two years and susceptible of renewal for an additional two year period (22 U.S.C. 217a, 44 Stat. 887);

18. That on December 9, 1960, Aptheker's passport expired;

19. That on March 3, 1961, Aptheker applied for the renewal of his passport. A copy of his renewal application is attached hereto as Exhibit 201;

20. That on March 21, 1961, Aptheker's passport was renewed to expire on December 9, 1962;

[fol. 57] 21. That on January 22, 1962, the Acting Director of the Passport Office of the Department of State notified Aptheker that by the direction of the Secretary of State his passport had been revoked because the Department of State believed that use by him of a United States passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785;

22. That thereafter on June 26, 1962, at Aptheker's request and pursuant to Section 51.135 *et seq.* of Title 22 of the Code of Federal Regulations Aptheker was accorded an administrative hearing to review the revocation of his passport. The Transcript of Proceedings is attached hereto as Exhibit 202;

23. That the hearing examiner, Mr. Raymond J. Lynch, issued his findings on October 15, 1962, recommending that the Director of the Passport Office make final the revocation of Aptheker's passport. This decision is attached hereto as Exhibit 203;

24. That on October 26, 1962, the Director of the Passport Office, having reviewed the transcript of the hearing and the hearing examiner's recommendation, concluded that the action revoking Aptheker's passport was in accordance with law and notified Aptheker of his appeal rights;

25. That thereafter on November 13, 1962, Aptheker was accorded a hearing before the Board of Passport Appeals. The Transcript of Proceedings is attached hereto as Exhibit 204;

26. That the Board of Passport Appeals found that "there is a preponderance of evidence in the record to show that at all material times [Aptheker] was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act [of 1950, 50 U.S.C. 781 *et seq.*];"

[fol. 58] 27. That on November 23, 1962, the Secretary of State approved the recommendation of the Board of Passport Appeals, specifically adopting as his own the above-quoted finding of the Board, and on the basis of that finding reaffirmed the revocation of Aptheker's passport on the ground that his use of a United States passport would violate Section 6 of the 1950 Act;

28. That notice of the decision of the Secretary of State was given to Aptheker by a letter from the Department of State dated November 26, 1962;

29. That Aptheker's passport expired on December 9, 1962, and is not further renewable;

30. That Aptheker has not applied for a new passport; and

31. That Aptheker filed this civil action on December 14, 1962.

Frances G. Knight

Sworn to before me this 24th day of May, 1963.

Helen Dzigan, Notary Public.

My Commission expires 10/31/63.

(Seal)

[fol. 59] Certificate of Service (omitted in printing).

[fol. 60]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3478-62

ELIZABETH GURLEY FLYNN,

v.

DEAN RUSK, Secretary of State.

Civil Action No. 3886-62

HERBERT EUGENE APTHEKER,

v.

DEAN RUSK, Secretary of State.

Mr. Joseph Forer of Washington, D. C., and Mr. John J. Abt, of the Bar of the State of New York, *pro hac vice*, by special leave of Court, for plaintiffs.

Mr. Benjamin C. Flannagan, Attorney, Department of Justice, with whom Mr. J. Walter Yeagley, Assistant Attorney General, and Mr. Oran H. Waterman, Attorney, Department of Justice, were on the brief, for defendant.

^o OPINION—Filed July 12, 1963

Before Burger, *Circuit Judge*, Hart and Walsh, *District Judges*.

On April 30, 1963, upon application of each plaintiff and agreement of the Government and after motion to convene a three-judge court was heard and granted, this Court was appointed to hear the question of the constitutional validity of section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993; 50 U.S.C. 785, as applied to the facts of the cases at bar.

The plaintiff Elizabeth Gurley Flynn filed suit on November 6, 1962, and the plaintiff Herbert Eugene Aptheker on December 14, 1962. The facts of each case are practically identical, and the cases were consolidated by order of the Court on April 29, 1963.

[f6l.61] Section 6 of the Subversive Activities Control Act, provides, in pertinent part, as follows:

“(a) When a Communist organization as defined in paragraph (5) of section 782 of this title, is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

“(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

“(2) to use or attempt to use any such passport.”

For the purposes of the questions here presented, the above section of the Act became effective October 20, 1961, when the Communist Party of the United States was ordered to register by a final order of the Subversive Activities Control Board, pursuant to the authority of section 7

of the Act, 50 U.S.C. 786, said section 7 having been previously upheld by the Supreme Court in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961).

On January 22, 1962, the Acting Director of the Passport Office notified both plaintiffs that their passports were revoked because of the belief by the Department of State that use of their passports would be in violation of the Subversive Activities Control Act. Plaintiffs were also informed of their right to a hearing. Subsequently, both passports expired: Mr. Aptheker's on December 9, 1962, and Mrs. Flynn's on March 9, 1963.

[fol. 62] Administrative hearings were held at the request of the plaintiffs at which plaintiffs were represented by counsel but did not choose to appear personally. The hearing examiner, in each case, found the plaintiffs to be members of the Communist Party and affirmed the ruling of the Passport Office. Both plaintiffs subsequently were accorded hearings before the Board of Passport Appeals and the decisions of the hearing examiners were affirmed. The Secretary of State adopted the findings of the Board as to both plaintiffs and held,

"there is a preponderance of evidence in the record to show that at all material times [each plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act."

The matter is now before the Court on cross-motions for summary judgment, both parties stipulating that all administrative remedies have been exhausted. The plaintiffs agree that for the purpose of these proceedings, the Secretary of State had an adequate evidentiary basis for finding that plaintiffs were members of the Communist Party. The plaintiffs further agree that the Secretary of State made findings on all matters required by section 6. The Secretary is not required, under the terms of the statute, to make any findings as to the purpose of the travel for which the passport is requested and he in fact made none.

The validity of section 6 has not been determined by the courts, but such determination was reserved for future consideration in *Communist Party v. Control Board*, *supra*, at 79. The Supreme Court stated:

"It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport * * *. None of these things may happen. If they do, appropriate administrative and judicial procedures will be available to test the constitutionality of applications of particular sections of the Act to particular persons in particular situations. Nothing justifies previsioning those issues now."

Plaintiffs allege that they wish to travel abroad for recreation and study in pursuit of their profession as writers. They contend that section 6 of the Act is unconstitutional as applied to them for the following reasons:

(1) Plaintiffs are deprived without due process of law of their constitutional liberty to travel abroad, in violation of the Fifth Amendment to the Constitution of the United States;

(2) Plaintiffs' rights to freedom of speech, press and assembly are abridged in violation of the First Amendment.

(3) A penalty is imposed on plaintiffs without a judicial trial, and therefore constitutes a bill of attainder, in violation of article I, section 9 of the Constitution;

(4) Plaintiffs are deprived of the right to trial by jury as required by the Fifth and Sixth Amendments and article III, section 2, clause 3 of the Constitution; and

(5) The action of the Secretary of State under section 6 constitutes imposition of a cruel and unusual punishment in violation of the Eighth Amendment.

The defendant admits all the material facts as alleged by the plaintiffs but denies that section 6 is unconstitutional. The defendant contends that the disqualification imposed [fol. 64] by section 6 is a valid regulatory device, reasonably drawn to meet the dangers of foreign subversion and

that it does not effect punishment for past activity but rather that it is a regulation of the activities of present members of the Communist Party necessary for the preservation of the Government.

It is admitted by both parties that if either plaintiff terminates his or her membership in the Communist Party that section 6 will no longer apply to him or her. They also agree that it would be a futile act for either plaintiff to apply for a passport or renewal of a passport until such membership is terminated. Indeed such application would be unlawful under section 6 of the Act as quoted above.

There is no contention that the administrative procedures provided by the defendant for determining plaintiffs' membership in the Communist Party were in any way inadequate or violated procedural due process.

The plaintiffs pray that the defendant be enjoined from enforcing section 6 of the Act and that defendant be ordered to reissue to each of them a valid United States passport.

The sole question to be decided by this Court is the constitutional validity of the section in question as applied to the facts of these cases. In order to properly decide this question it is necessary to view the enactment of the Subversive Activities Control Act of 1950 in its proper context.

In 1948 a Congressional Committee found that legislation was needed to

[fol. 65] " . . . cut the threads which bind the international Communist conspiracy together by restricting travel of members of the American section of the World Communist Movement."

H. R. 1844; 80th Cong., 2d Sess., dated April 30, 1948. The same thought was expressed in the debates which preceded enactment of the Internal Security Act of 1950, 64 Stat. 987 *et seq.*, 50 U.S.C. 781 *et seq.*, 94 Cong. Rec. 5850 and 5851; H.R. 2981, 81st Cong. 2d Sess., dated August 22, 1950.

The Congress found in Section 2(1) of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. 781(1), that

"[t]here exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a worldwide Communist organization."

The Congress also found in Section 2(6) of the Act that

"[t]he Communist action organizations so established and utilized in various countries, acting under such control, direction and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. . . ."

The Congress further found in Section 2(8) of the Act that

"[d]ue to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives [fol. 66] in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."

The Congressional findings contained in the 1950 Act are binding on this Court. As the Supreme Court stated in the case of *Communist Party v. Control Board*, *supra*, at 94-95, with respect to the Congressional findings relating to the nature of the world Communist movement and the threat it poses to the security of the United States:

"It is not for the courts to re-examine the validity of these legislative findings and reject them. See *Hari-*

siades v. Shaughnessy, 342 U.S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half. [Footnote omitted.] Cf. *Nebbia v. New York*, 291 U.S. 502, 516, 530. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 U.S. 522, 529; *American Communications Assn. v. Douds*, 339 U.S. 382, 388-389. * * *

In interpreting these same cases cited above, the Court of Appeals for the District of Columbia Circuit has stated,

"The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt those findings." *Communist Party v. Subversive Activities Control Board*, 223 F.2d 531, 565 (1954).

The plaintiffs nevertheless argue that the findings made by the Congress in the Subversive Activities Control Act of 1950 as to the dangers threatening our Government by the world Communist movement, and upheld by the Supreme Court in *Communist Party v. Control Board*, *supra*, were made some thirteen years ago and may not be considered binding on the courts at this time. There has been no evidence offered or adduced that the "leopard" of the world Communist movement has changed a single spot in the past thirteen years nor would common sense nor common knowledge indicate any such change.

In addition, section 13(b) of the Act, 50 U.S.C. §792(b), contains the procedure whereby an organization which has been required to register by a final order of the Subversive Activities Control Board may seek the cancellation of such registration. On proper showing, the Board could cancel their prior registration order and the members of the organization would be under no impediment as to the use or issuance of passports. To our knowledge, the Communist Party has not sought to utilize the procedures under section 13(b).

The findings of the Congress made in section 2 of the Subversive Activities Control Act of 1950 are therefore as

valid and as binding on this Court today as on the day on which they were made. It is in the light of these congressional findings that the plaintiffs' claims of unconstitutionality of section 6 of the Act must be judged.

Denial of a passport to a citizen is a denial of the right to travel outside the United States. *Worthy v. Herter*, 270 F.2d 905 (D.C.Cir., 1959), *cert. den.*, 361 U.S. 918. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent v. Dulles*, 357 U.S. 116, 125 (1958). The Supreme Court further noted in *Kent* that "[i]f that 'liberty' is to be regulated, it must be pur-[fol. 68] suant to the law-making functions of the Congress." *Id.* at 129. The Supreme Court in *Kent* did not review the constitutionality of the restrictions on travel involved in that case. It merely held that the Secretary of State did not have the authority to deny passports to citizens because of their alleged Communistic beliefs and associations and their refusal to file affidavits concerning their membership in the Communist Party when sections 2 and 6 of the Subversive Activities Control Act had not yet become effective. The Court said it would be

"strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations." *Id.* at 130.

It is clear in the present case that certain liberties of these plaintiffs, as alleged by them in their brief in these consolidated cases and in oral argument before this Court, are being restricted. Restriction or regulation of liberty, however, by no means indicates constitutional invalidity of the regulatory scheme. As the Supreme Court stated in *Communist Party v. Control Board*, *supra*, at 96-97,

"Individual liberties fundamental to American institutions are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers. But where the problems of accommodating

the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of §2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative [fol. 69] judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods. Especially where Congress, in seeking to reconcile competing and urgently demanding values within our social institutions, legislates not to prohibit individuals from organizing for the effectuation of ends found to be menacing to the very existence of these institutions, but only to prescribe the conditions under which such organization is permitted, the legislative determination must be respected. *United Public Workers v. Mitchell*, 330 U.S. 75; *American Communications Assn. v. Douds*, *supra*."

In the *Douds* case cited, the Court upheld the validity of Section 9(h) of the National Labor Relations Act which denies the benefits of certain provisions of that Act to labor organization officers who have not filed non-Communist affidavits. The opinion, 339 U.S. at 390-91, states, "We think it is clear, in addition, that the remedy provided by §9(h) bears reasonable relation to the evil which the statute was designed to reach."

Such is the case here. In view of the findings by the Congress set forth above, we hold that the enactment by Congress of section 6, which prohibits these plaintiffs from obtaining passports so long as they are members of an organization—in this case the Communist Party—under a final order to register with the Attorney General: see 50 U.S.C. §786(a), is a valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regulatory scheme bears a reasonable relation thereto. Under

circumstances such as these, our basic system of democracy permits the reasonable deprivation of the liberty of certain [fol. 70] of its citizens who are brought within the proscriptions of a legislative determination by due process of law. We further hold that the deprivation of liberty, such as it is as applied to these plaintiffs, is not a cruel and unusual punishment in violation of the Eighth Amendment, but is rather a reasonable regulation of conduct which bears a direct relation to the evil Congress has found inimical to the interests of the United States as a sovereign nation. See section 2(8) of the Act quoted above.

It is argued that substantive due process of law is denied the plaintiffs herein because section 6 of the Subversive Activities Control Act requires the denial of a passport upon a mere finding that the plaintiffs are members of the Communist Party and because the Act does not go further and require a determination that the plaintiffs do not wish to travel abroad simply for personal reasons of pleasure and recreation, but that they in fact intend to travel abroad for the additional purpose of carrying on activities to further the purposes of the world Communist movement. In other words, the plaintiffs argue that Congress may not conclusively presume that the plaintiffs, who have admittedly been lawfully determined to be members of the Communist Party, which in turn has lawfully been determined to be a Communist-action organization as defined in section 3(3) of the Act, 50 U.S.C. §782(3), will act as members of the Communist Party while travelling abroad. They say the defendant-Secretary must presume that they are travelling for purely innocent purposes unless procedures are provided [fol. 71] for determining their thoughts and intentions and it is affirmatively found that it is their thought and intention to act as members of the Communist Party and to carry on activities while abroad to further the purposes of the world Communist movement.

We hold that for Congress conclusively to presume that a member of a Communist-action organization while travelling abroad will act like a member of such an organization as defined by the statute—by carrying on activities to further the purposes of the world Communist movement which presents “a clear and present danger to the security of the

United States and to the existence of free American institutions," section 2(15) of the Act, 50 U.S.C. §781(15)—is not so unreasonable as to violate the plaintiffs' constitutional rights. We so hold in light of the Congressional findings set forth in section 2 of the Act, mindful of the peculiar and fundamental nature of those findings; and in light of the lawful procedures set forth in the Act, and followed in these cases before us, for determining whether an organization is a Communist-action organization and whether the individual citizens involved are knowingly members of such an organization.

The record in these cases, furthermore, shows that the plaintiff Flynn joined the Communist Party in 1937, has been a member of the National Committee of the Communist Party since 1938, and is currently the Chairman of the Communist Party of the United States of America. The plaintiff Aptheker joined the Party in 1939 and is presently Editor of *Political Affairs*, the self-described "theoretical organ of the Communist Party" of the United States. These facts are [fol. 72] undisputed for purposes of the motions for summary judgment before this Court on review of the administrative proceedings below. Thus these plaintiffs clearly have meaningful associations with the Communist Party in this country, to say the least. This fact negates, in these cases, any unknowing or naive relationship with the organization under a final order to register with the Attorney General of which these plaintiffs are members. The Congressional presumption therefore retains a notable vitality. See *Gastelum-Quinones v. Kennedy*, 31 U.S.L. Week 4637 (U.S. June 17, 1963); *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957); *Galvan v. Press*, 347 U.S. 522, 528 (1954).

The plaintiffs contend that section 6 is a bill of attainder, but as was said in the *Doufs* case, 339 U.S. at 413-14:

" * * * in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to

be; but that does not alter the conclusion that §9(h) is intended to prevent future action rather than to punish past action.

"This distinction is emphasized by the fact that members of those groups identified in §9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past." [Emphasis in original.]

The same situation exists here. Section 6 would not be a bar to the issuance or use of a passport if the plaintiffs renounced their present membership in the Communist [fol. 73] Party. See also *Trop v. Dulles*, 356 U.S. 86, 95 (1958); *United States v. Lovett*, 328 U.S. 303, 315 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 356, 363 (1866).

In the instant case the restriction is not as severe as that in the *Déuds* case, where the individuals were "subject to possible loss of position." Here, the plaintiffs are free to travel throughout the United States and most of the Western Hemisphere. The limitation on their right to travel is restricted to those countries which require a United States citizen to have a passport to enter their borders.

It was also stated in *Communist Party v. Control Board*, 367 U.S. 1, 86-87,

"The [Subversive Activities Control] Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage. * * * Present activity constitutes an operative element to which the statute attaches legal consequences * * *"

It is clear to this Court that section 6 of the Act is not penal nor is it a bill of attainder. It is instead a legitimate exercise of the authority of Congress to regulate the travel of members of Communist organizations, based on the legislative determination that such travel would be inimicable and dangerous to the security of the United States.

We therefore hold that the Constitution does not prohibit the denial of passports to plaintiffs as present members of

a Communist organization under section 6 of the Subversive Activities Control Act of 1950.

[fol. 74] Defendant's motions for summary judgment are granted as to each case.

The plaintiffs' motions for summary judgment in each case are denied.

The plaintiffs' requests for permanent restraining orders against the defendant are denied.

Leonard P. Walsh.

July 12, 1963

[fol. 75]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3478-62

ELIZABETH GURLEY FLYNN, Plaintiff,

v.

THE SECRETARY OF STATE, Defendant.

Civil Action No. 3886-62

HERBERT APTHEKER, Plaintiff,

v.

THE SECRETARY OF STATE, Defendant.

ORDER—Filed August 2, 1963

The cause having come before the Court on cross-motions of the parties for summary judgment, and the Court having considered all of the pleadings and exhibits filed and having

heard the oral argument of counsel for each side, and the Court on July 12, 1963, having issued and filed its opinion, it is therefore by the Court this 2nd day of August, 1963:

Ordered that plaintiffs' motions for summary judgment as to each case be, and the same hereby are, denied; and that plaintiffs' requests for permanent restraining orders against the defendant be, and the same hereby are, denied; and it is

Further Ordered that the defendant's motions for summary judgment as to each case be, and the same hereby are, granted; and that the actions be, and the same hereby are, dismissed, with costs to the defendant.

Warren E. Burger, United States Circuit Judge.

G. L. Hart, United States District Judge.

Leonard P. Walsh, United States District Judge.

[fol. 76]

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 77]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL OF HERBERT APTHEKER TO THE SUPREME COURT OF THE UNITED STATES—August 9, 1963

I. Notice is hereby given that Herbert Aptheker, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order granting defendant's motion for summary judgment, denying plaintiff's motion for summary judgment and request for permanent restraining order, and dismissing the action, which order was entered in this action on August 2, 1963.

This appeal is taken pursuant to 28 U. S. C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States, and include in said transcript the entire record of this action, including this notice of appeal.

III. The following question is presented by this appeal: Whether section 6 of the Subversive Activities Control Act, 50 U. S. C. §785, is unconstitutional on its face or as applied to appellant.

Joseph Forer, Attorney for Herbert Aptheker, Plaintiff and Appellant, 711 14th St. N. W., Washington 5, D. C.

[fol. 78]

PROOF OF SERVICE (omitted in printing)

[fol. 79]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL OF ELIZABETH GURLEY FLYNN TO THE
SUPREME COURT OF THE UNITED STATES
—Filed August 9, 1963

I. Notice is hereby given that Elizabeth Gurley Flynn, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order granting defendant's motion for summary judgment, denying plaintiff's motion for summary judgment and request for permanent restraining order, and dismissing the action, which order was entered in this action on August 2, 1963.

This appeal is taken pursuant to 28 U. S. C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of this action, including this notice of appeal.

III. The following question is presented by this appeal: Whether section 6 of the Subversive Activities Control Act, 50 U. S. C. §785, is unconstitutional on its face or as applied to appellant.

Joseph Forer, Attorney for Elizabeth Gurley Flynn,
Plaintiff and Appellant, 711 14th St. N. W., Wash-
ington 5, D. C.

[fol. 80]

PROOF OF SERVICE (omitted in printing)

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. 461, October Term, 1963

[Title omitted]

Appeal from the United States District Court for the
District of Columbia.

ORDER NOTING PROBABLE JURISDICTION—December 2, 1963

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable jurisdic-
tion is noted.

461

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FILED

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1963

No. 461

HERBERT APTHEKER and ELIZABETH
GURLEY FLYNN,

Appellants,

v.

THE SECRETARY OF STATE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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IN THE
Supreme Court of the United States

October Term, 1963

No.

HERBERT APTHEKER AND ELIZABETH GURLEY FLYNN,
Appellants,

v.

THE SECRETARY OF STATE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Herbert Aptheker and Elizabeth Gurley Flynn, appellants, having appealed from the final order of a three-judge court of the United States District Court for the District of Columbia granting appellee's motion for summary judgment, dismissing appellants' complaints and denying appellants' motions for summary judgment and their requests for permanent restraining orders, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion below (F. R. 117-31; Appendix A, *infra*) has not yet been officially reported.

¹ "F. R." refers to the Flynn record, "A. R." to the Aptheker record. Where the same document appears in both records, we will refer only to F. R.

Jurisdiction

Appellants brought actions in the United States District Court for the District of Columbia for judgments (a) declaring unconstitutional section 6 of the Subversive Activities Control Act (hereafter called the Act), 64 Stat. 993, 50 U. S. C. 785; (b) enjoining the Secretary of State, because of the unconstitutionality of section 6, from enforcing it against them by continuing in effect his revocation of their passports, and (c) requiring him to reissue passports to them. The actions, which were consolidated in the court below (F. R. 46), were brought under D. C. Code, secs. 11-305 and 11-306; 28 U. S. C. 2201, 2282, and 2284; and sec. 10 of the Administrative Procedure Act, 5 U. S. C. 1009. (A. R. 4-7; F. R. 4-6.)

The judgment below (F. R. 132; Appendix B, *infra*) is dated and was entered on August 2, 1963. Each appellant filed a notice of appeal in the court below on August 9, 1963 (A. R. 61; F. R. 134).

Jurisdiction of this appeal is conferred on the Court by 28 U. S. C. 1253. The following decisions sustain the Court's jurisdiction: *Schneider v. Rusk*, 372 U. S. 224; *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713; *Florida Lime Growers v. Jacobsen*, 362 U. S. 73; *Bauer v. Acheson*, 106 F. Supp. 445. Cf. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-55.

Statutes Involved

Section 6 of the Subversive Activities Control Act, 64 Stat. 993, 50 U. S. C. 785, provides:

Sec. 6(a): When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.²

The pertinent portion of section 15(c) of the Subversive Activities Control Act, 64 Stat. 1003, 50 U. S. C. 794(c), provides:

(c) * * * Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

Questions Presented

Whether section 6 of the Subversive Activities Control Act is unconstitutional on its face or as applied.

Statement of the Case

The relevant facts are not in dispute.

Appellants are American citizens by birth, and on January 21, 1962, were the holders of United States passports (A. R. 4, 11; 18; F. R. 4, 14, 21).

² Former subsection (c) of Section 6 was repealed August 24, 1954, 68 Stat. 778.

On April 20, 1953, the Subversive Activities Control Board (hereafter called the Board) issued an order requiring the Communist Party of the United States to register as a Communist-action organization under section 7 of the Act, 64 Stat. 993, 50 U. S. C. 786. This order became final on October 20, 1961 (F. R. 118). See *Communist Party v. S.A.C.B.*, 367 U. S. 1, rehearing denied, 368 U. S. 871; Act, sec. 14(b), 64 Stat. 1102; 50 U. S. C. 793(b).

On January 22, 1962, the Acting Director of the Passport Office notified appellants that their passports were revoked by direction of the Secretary of State because of the belief of the Department of State that appellants' use of the passports would violate section 6 of the Act (A. R. 22; F. R. 25). Appellants thereupon secured administrative review of this action pursuant to the departmental regulations, 22 C. F. R. Chap. 1, Part 51 (F. R. 109-12):

Administrative hearings were followed by decisions of the Director of the Passport Office affirming the passport revocations (A. R. 23-24; F. R. 26-27). Appeals to the Board of Passport Appeals resulted in a finding in each case that "there is a preponderance of evidence in the record to show that at all material times [each appellant] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act." On the basis of these findings, the Board recommended affirmance of the decisions of the Passport Office. The recommendations in the two cases were approved by the Secretary of State on October 18 (Flynn) and November 23, 1962 (Aptheker), respectively. The Secretary adopted the finding as to each appellant quoted above and confirmed the revocations of their passports on the basis of his conclusion that use of the passports by appellants would violate section 6 of the Act. (A. R. 25-26; F. R. 28-30).

Dr. Aptheker is a well-known scholar in the fields of history, political science and sociology. He was, at the time of the administrative hearing, editor of *Political Affairs*, the theoretical organ of the Communist Party of the United States. He is the author of fourteen books and has edited or contributed to several others, including the official History of the Army Ground Forces in World War II. He is also the author of some thirty pamphlets and numerous articles and reviews in scholarly journals. He has lectured at many universities, colleges and other forums. In 1959 and 1960 he travelled to Europe, and while there lectured before various learned academies and universities. In 1961 he delivered papers before the Japanese Historical Association in Tokyo and at the University of Tokyo. The revocation of his passport prevented him from accepting invitations to attend a world gathering of historians at Dresden, Germany, to deliver a series of lectures on the American Civil War at Humboldt University, and to attend an assemblage of scholars in Accra, Ghana, for a discussion of the projected Encyclopedia Africana. His inability to travel to Europe also denies him access to overseas archives and depositories necessary for his historical studies, including continuation of his work on *The History of the American People*, of which the first two volumes have been published. Dr. Aptheker desires to travel to Europe and elsewhere to pursue his historical studies, attend meetings of learned societies and scholars, exchange opinions with fellow historians, lecture at foreign universities, and observe conditions and gather material for his writing and lecturing in this country (A. R. 18-20; F. R. 128.)

The court below found on the basis of the administrative record that Mrs. Flynn is Chairman of the Communist Party of the United States. (F. R. 128). She has for many years written under her by-line a weekly column for the newspaper, *The Worker* (formerly *The Daily Worker*). She is the author of two books, including the first volume

of a planned two-volume autobiography. She lectures extensively throughout the United States. She has made a number of trips to Europe and desires to travel there again for rest and recreation, to gather material for use in writing and speaking to American audiences, and to lecture to European audiences (F. R. 21-23).

The denial of passport facilities to appellants makes it unlawful for them to travel outside of the Western Hemisphere. Because of the basis of the Secretary's action, it would be futile for appellants to apply for new passports. Moreover, any such application would invite criminal prosecution for violation of section 6.³ (A. R. 3, 12-13; F. R. 5, 15-16, 121.)

The sole ground for appellants' challenge of the Secretary's action in the court below was that section 6, on its face and as applied to them, is unconstitutional (A. R. 4-7; F. R. 4-6). In view of that fact and of appellants' request for injunctions requiring the Secretary to reissue passports to them, they applied for a three judge court which was convened in the consolidated action, with the

³ The passports which the Secretary revoked would have expired by their terms on December 9, 1962 in the case of Dr. Aptheke and on March 9, 1963, in the case of Mrs. Flynn (F. R. 118). No claim of mootness on that account has been made, or would be warranted. The controversy as to the validity of section 6 and the determination of the Secretary that appellants are ineligible for passports still remains. Mootness is precluded by the short-term order or license doctrine. *Southern Pac. Term. Co. v. I.C.C.*, 219 U. S. 498, 514-15; *Southern Pac. Co. v. I.C.C.*, 219 U. S. 433, 452; *Leonard v. Earle*, 279 U. S. 392; *Technical Radio Lab. v. Fed. Radio Comm.*, 36 F.2d 111. The doctrine is fortified here by the fact that under section 6 appellants cannot reapply for passports without facing criminal prosecution.

agreement of the Secretary, pursuant to 18 U. S. C. 2282 and 2284 (F. R. 117).⁴

Appellants moved (A. R. 17; F. R. 20) and the Secretary cross-moved (F. R. 52-53) for summary judgment. The court below granted the Secretary's motion and dismissed the complaints, denying appellants' motions and their requests for injunctive relief (F. R. 132).

The Questions Are Substantial

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . . Freedom of movement also has large social values." *Kent v. Dulles*, 357 U. S. 116, 125-126. Accordingly, the Court stated (at 130): "We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations."

Section 6 of the Act requires the Secretary to withhold passports from citizens solely because of their association as members of certain organizations. This case therefore presents the "important constitutional questions" which

⁴ The injunctions sought by appellants on the ground of the unconstitutionality of section 6 would restrain the enforcement, operation and execution of section 6 by requiring the Secretary to issue passports to appellants without regard to whether they are members of the Communist Party and notwithstanding the fact that he has reason to believe that they are, as he found, members of the Communist Party.

the Court did not reach in *Kent*, and consideration of which was held to be premature on review of the order requiring the Communist Party to register under the Act, *Communist Party v. S. A. C. B.*, 367 U. S. 1, 79. These questions arise under the due process clause and the First Amendment.

1. Due Process.

Section 6 violates due process in three respects.

(a) The section bars an individual from travelling abroad solely because he is a member of an organization which has been finally ordered by the Board to register as a Communist-action or Communist-front organization.⁵

The legislative justification for section 6 is stated in the finding of section 2(8), 50 U. S. C. 781(8), that travel by Communists is a prerequisite for the carrying on of activities to further the nefarious purposes which section 2 ascribes to the world Communist movement (see *infra*, p. 11). However, since section 6 applies to all members of a described organization, it bars travel by members who are inactive or who participate only in the lawful activities of the organization, who are personally innocent of any wrongful conduct, who do not know or believe that the organization has the characteristics attributed to it by the Board,⁶ and whose proposed travel is for legitimate and even laudable purposes.

⁵ The term "Communist organization" used in section 6 is defined by section 3(5) of the Act, as amended, 50 U. S. C. 782(5), to include Communist-action, Communist-front and Communist-infiltrated organizations. The last, however, are not subject to a registration requirement. See section 7, 50 U. S. C. 786.

⁶ Section 6(a) applies if the member has knowledge or notice that the organization is registered or that the registration order against it has become final. Under section 13(k) of the Act, 50 U. S. C., 792(k), publication in the Federal Register of the fact that a registration order has become final constitutes notice of that fact to all members of the organization.

Section 6 thus creates a conclusive presumption that all members of proscribed organizations, whenever they travel abroad, will, or will be likely to, engage in activities endangering the national security. The section is, therefore, an extreme instance of the imputation of guilt from association. *Schneiderman v. United States*, 320 U. S. 118, 154-155, doubted the permissibility of imputing to an officer of the Communist Party personal belief in the Party's alleged tenets of force and violence. Section 6 goes much further. It imputes both an ideology and a propensity to engage in specific criminal conduct. And it imputes these not only to officers of the Communist Party, but to all its members and to non-Communist members of front organizations.

The un rebuttable presumption created by section 6 is not credible, is contrary to experience, and is unnecessary to meet the alleged evil. Section 6, therefore, imposes a discrimination which is "so unjustifiable as to be violative of due process" (*Bolling v. Sharpe*, 347 U. S. 497, 499) and runs afoul of the due process requirement that deprivations of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia v. New York*, 291 U. S. 502, 525; *Perez v. Brownell*, 356 U. S. 44, 58. The section likewise violates the precept that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 86. See also, *Tot v. United States*, 319 U. S. 463.

It is established that due process prohibits the imposition of criminal sanctions or civil disabilities for membership in the Communist Party when unaccompanied by knowledge of the organization's alleged illicit purposes and the intent to effectuate them. *Scales v. United States*, 367 U. S. 203, 224-28; *Adler v. Board of Education*, 342 U. S. 485, 494-96; *Wieman v. Updegraff*, 344 U. S. 183. Section 6 contravenes this principle.

(b) In accordance with section 6, appellants have been denied passports on the basis of a finding, made in a proceeding to which they were not parties, that the Communist Party is a Communist-action organization. This procedure violates the due process principle that persons may not be deprived of liberty or property without a hearing at which they may contest the alleged factual basis for the deprivation. *Heiner v. Donnan*, 285 U. S. 312, 325; *Mobile, Jackson & K. C. Ry. v. Turnipseed*, 219 U. S. 35, 43; *Ohio Bell Telephone Co. v. P. U. C.*, 301 U. S. 292, 301-02; *Renaud v. Abbott*, 116 U. S. 277, 288; *Noto v. United States*, 367 U. S. 290, 299. Cf. *Kirby v. United States*, 174 U. S. 47. This due process defect is magnified by the fact that the issue as to which appellants are precluded under section 6—whether the Communist Party is a Communist-action organization—supplies the only possible constitutional justification for the passport sanction. Yet *United States v. Carolene Products Co.*, 304 U. S. 144, 152, states “that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.”

Moreover, the finding that the Communist Party is a Communist-action organization was made by the Board on April 20, 1953, the date of its order. *Communist Party v. S.A.C.B.*, *supra*, at 19-20. Yet section 6 precludes appellants from showing that this ten-year-old finding is no longer tenable.⁷ The section thus violates the due process principle that “the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that these facts have ceased

⁷ As the Chief Justice's dissent in the *Party* case (at 133, n. 11) pointed out, the Board's finding was based on a “dubious” presumption of continuity applied to “stale evidence” of pre-1940 events.

to exist." *United States v. Carolene Products Co.*, *supra*, at 153; *Chastleton Corporation v. Sinclair*, 264 U. S. 543.⁸

(c) The findings of the Act which state Congress' justification for section 6 have no foundation in the facts with respect to the Communist Party. This appears from the findings made by the Board in the proceeding to require the Party to register under the Act.

Section 2(8) of the Act, 50 U. S. C. 781(8), finds that "travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." The "purposes of the Communist movement" are elsewhere described in section 2 as being the overthrow of existing governments, by the use of illegal means if necessary, and their replacement by "Communist totalitarian dictatorships" subservient to the Soviet Union. Section 2(1), (2), (3), (6), 64 Stat. 987-88; 50 U. S. C. 781(1), (2), (3), (6); *Communist Party v. S.A.C.B.*, *supra*, at 55. Both aspects of these ex parte legislative findings are belied by the findings made by the Board on the basis of the voluminous evidence adduced in the proceeding which resulted in the Board's registration order against the Communist Party.⁹

⁸ There is no provision of the Act permitting members of the Communist Party to secure a redetermination of its status. Nor can the Party itself do so. Only registered organizations may petition for redetermination. Section 13(b), 50 U. S. C. 792(b). The Party has not registered and is presently litigating the constitutional objections to the registration requirement which were held to be premature in *Communist Party v. S.A.C.B.*, *supra*. See *Communist Party v. United States*, No. 17,583, C. A. D. C. The statement in the opinion below (F. R. 124) that the procedures of Section 13(b) are available to the Party is, therefore, erroneous.

⁹ The relevant findings of the Board are continued in its Modified Report of December 18, 1956, which appears in the transcript of the record in *Communist Party v. S.A.C.B.*, No. 537, October Term, 1959. Page references herein to the Modified Report are to the pages of that record. The Modified Report is also an exhibit in the Flynn record.

The Board made the conclusory finding (p. 2644) that the Communist Party, "is substantially directed, dominated and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act, and operates primarily to advance the objectives of such world movement." Yet, contrary to the section 2(8) finding that foreign travel is a prerequisite to furtherance of the purposes of this movement, the Report of the Board contains no finding of significant travel by Communist Party members to foreign countries or by foreign Communists to this country after 1936.¹⁰ Accordingly, section 2(8) cannot furnish a justification for the denial of travel rights to members of the Communist Party:

Furthermore, even if foreign travel by Communist Party members were essential to the activities of the organization, that fact could not justify the travel ban unless the activities in question were unlawful or endangered the national security. The Board, however, made no finding that the Party engages in or incites the use of any of the illegal means described in section 2 of the Act. The most that the Board found was that the Party advocates the forcible overthrow of the government as a matter of abstract doctrine. See *Communist Party v. S.A.C.B.*, *supra*, at 56 (ma-

¹⁰ The most recent date on which the Board found (p. 2598) that members of the Communist Party of this country attended Soviet schools for "training and instruction in the strategy and tactics of the world Communist movement." The Board's report refers to only four later instances of foreign travel. One (p. 2543) is that "a correspondent of the *Daily Worker* is stationed in Moscow." The other three concern travel by appellant Flynn to France and England in 1945, 1949 and 1950 (pp. 2605-06). The Board attached no significance to these visits. The only finding that any foreign Communist was in this country after 1936 was (p. 2528) that "as of 1945 Eisler was shown to be acting as an authoritative foreign Communist representative to [the Communist Party]." However, the Board made no finding as to the nature of Eisler's activities in this country, much less that his presence here furthered the purposes of the world Communist movement in any way.

majority opinion) and 130-33 (dissent of the Chief Justice). Advocacy of this sort is not unlawful and may not be punished. *Yates v. United States*, 354 U. S. 298; *Noto v. United States*, 367 U. S. 290; *Communist Party v. S.A.C.B.*, *ibid.* It follows that the fact that a Communist Party member may use foreign travel to promote such lawful advocacy cannot justify the denial of his right to travel.¹¹

Thus the justification for section 6 advanced by the Act lacks any factual foundation with respect to the Communist Party. Accordingly, the application of the Act to persons found to be members of the Party is an arbitrary and unreasonable and therefore invalid deprivation of their liberty. *Nebbia v. New York*; *Perez v. Brownell*, both *supra*.

2. The First Amendment.

Section 6 is invalid because it abridges freedom of association and, as here applied, freedom of expression.

The section bars travel solely because of membership in proscribed organizations. It is thus a discouragement of association.¹² Governmental measures which inhibit or

¹¹ The *Communist Party* case holds, (at 56) that a finding of unlawful acts or advocacy is not a constitutional prerequisite to the application of the registration provisions of the Act because in this aspect the Act "is a regulatory, not a prohibitory statute." While this may be true with respect to the disclosure requirements of Section 7, it is plainly not true of Section 6, which prohibits foreign travel to members of certain organizations and makes it a crime for them to apply for or use passports.

¹² This discouragement applies not only as to organizations which have been finally found to be Communist-action or front organizations, but also as to organizations against which registration proceedings are pending, threatened, or thought possible. Cf. *N.A.A.C.P. v. Button*, 371 U. S. 415, 434-36. The section also discourages persons from associating with organizations in ways short of actually joining, because of the possibility that government officials may consider

ganizational association are subject to First Amendment limitations. *N.A.A.C.P. v. Alabama*, 357 U. S. 449; *Bates v. Little Rock*, 361 U. S. 516; *Sweezy v. New Hampshire*, 254 U. S. 234, 250-61. Such limitations apply to legislation which deters membership in the Communist Party and participation in its legal advocacy and activity. *Scales v. United States*, 367 U. S. 203, 228-30; *Communist Party v. S.A.C.B.*, *supra*, at 88-105; *American Communications Association v. Douds*, 339 U. S. 382, 383, 402-04.

As here applied, the section also deprives appellants of the opportunity to study conditions abroad and to form opinions on the basis of what they see and hear. The situation is the same as if appellants were prohibited from going to lectures or reading books. Appellants are being denied the First Amendment "right to hear" (*United States v. C. I. O.*, 335 U. S. 106, 144), in contravention of the Amendment's function of facilitating self-government by insuring to the people unfettered access to information and ideas. See Chafee, *Free Speech in the United States* (1948) 33; Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) 91; *Gilbert v. Minnesota*, 254 U. S. 325, 337-38 (Brandeis, J., dissenting).¹³

Finally, both appellants desire to travel abroad to gather material for the pursuit of their professions as writers

(Continued from page 13)

such association to be indicative of membership. Although this case does not, on its facts, present these applications of Section 6, "usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution." *Smith v. California*, 361 U. S. 147, 151.

¹³The denial of the right to learn applies not only to appellants but to virtually everyone whom Section 6 prevents from travelling. See *Kent v. Dulles*, *supra*, at 126-27.

and lecturers and to speak to European audiences—in Dr. Aptheker's case, to lecture at European universities. Freedom to travel for these purposes is a part of their freedom of expression just as "a newspaperman's right to travel is a part of the freedom of the press." *Worthy v. Herter*, 270 F. 2d 905, 908.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U. S. 415, 433. To the same effect, *Shelton v. Tucker*, 364 U. S. 479, 488; *Smith v. California*, 361 U. S. 147; *Talley v. California*, 362 U. S. 60, 63-64; *Butler v. Michigan*, 352 U. S. 380. Accordingly, a restraint on membership in the Communist Party may "not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent'." *Scales v. United States*, 367 U. S. 203, 229. And *DeJonge v. Oregon*, 299 U. S. 353, held that Communists may not be barred from engaging in peaceable speech and assembly even if it is assumed that the Communist Party on other occasions engages in illegal acts or advocacy. Cf. *Thomas v. Collins*, 323 U. S. 516, 540.

Section 6 violates these principles, even assuming that the findings of section 2 are supportable and that some American Communists sometimes go abroad for purposes that Congress has a right to prevent. For section 6 bars all Communists and many non-Communists¹⁴ from foreign travel for legitimate purposes, including the exercise of First Amendment rights. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, *supra*, at 383.

The vice of section 6 is compounded by the fact that its prohibition of foreign travel constitutes, as in the pres-

¹⁴ Members of Communist-front organizations and persons who the Passport Office merely "has reason to believe" are members of organizations ordered to register as Communist-action organizations.

ent case, a prior restraint on the exercise of First Amendment rights. The section therefore "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 272 U. S. 58, 70.

CONCLUSION

The questions are substantial, and the Court should note probable jurisdiction.

Respectfully submitted, —

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APPENDIX A—Opinion Below
IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 3478-62

ELIZABETH GURLEY FLYNN,

v.

DEAN RUSK, Secretary of State.

CIVIL ACTION No. 3886-62

HERBERT EUGENE APTHEKER,

v.

DEAN RUSK, Secretary of State.

Mr. Joseph Forer of Washington, D. C., and Mr. John J. Abt of the Bar of the State of New York, *pro hac vice*, by special leave of Court, for plaintiffs.

Mr. Benjamin C. Flannagan, Attorney, Department of Justice, with whom Mr. J. Walter Yeagley, Assistant Attorney General, and Mr. Oran H. Waterman, Attorney, Department of Justice, were on the brief, for defendant.

Before BURGER, *Circuit Judge*, HART and WALSH, *District Judges*.

On April 30, 1963, upon application of each plaintiff and agreement of the Government and after motion to

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convene a three-judge court was heard and granted, this Court was appointed to hear the question of the constitutional validity of section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. C. 785, as applied to the facts of the cases at bar.

The plaintiff Elizabeth Gurley Flynn filed suit on November 6, 1962, and the plaintiff Herbert Eugene Aptheker on December 14, 1962. The facts of each case are practically identical, and the cases were consolidated by order of the Court on April 29, 1963.

Section 6 of the Subversive Activities Control Act, provides, in pertinent part, as follows:

“(a) When a Communist organization as defined in paragraph (5) of Section 782 of this title, is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

“(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

“(2) to use or attempt to use any such passport.”

For the purposes of the questions here presented, the above section of the Act became effective October 20, 1961, when the Communist Party of the United States was ordered to register by a final order of the Subversive Activities Control Board, pursuant to the authority of section 7 of the Act, 50 U. S. C. 786, said section 7 having been previously upheld by the Supreme Court in *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1 (1961).

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On January 22, 1962, the Acting Director of the Passport Office notified both plaintiffs that their passports were revoked because of the belief by the Department of State that use of their passports would be in violation of the Subversive Activities Control Act. Plaintiffs were also informed of their right to a hearing. Subsequently, both passports expired: Mr. Aptheker's on December 9, 1962, and Mrs. Flynn's on March 9, 1963.

Administrative hearings were held at the request of the plaintiffs at which plaintiffs were represented by counsel but did not choose to appear personally. The hearing examiner, in each case, found the plaintiffs to be members of the Communist Party and affirmed the ruling of the Passport Office. Both plaintiffs subsequently were accorded hearings before the Board of Passport Appeals and the decisions of the hearing examiners were affirmed. The Secretary of State adopted the findings of the Board as to both plaintiffs and held,

"there is a preponderance of evidence in the record to show that at all material times [each plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act."

The matter is now before the Court on cross-motions for summary judgment, both parties stipulating that all administrative remedies have been exhausted. The plaintiffs agree that for the purpose of these proceedings, the Secretary of State had an adequate evidentiary basis for finding that plaintiff were members of the Communist Party. The plaintiffs further agree that the Secretary of State made findings on all matters required by section 6. The Secretary is not required, under the terms of the stat-

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ute, to make any findings as to the purpose of the travel for which the passport is requested and he in fact made none.

The validity of section 6 has not been determined by the courts, but such determination was reserved for future consideration in *Communist Party v. Control Board, supra*, at 79. The Supreme Court stated:

"It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport . . . None of these things may happen. If they do, appropriate administrative and judicial procedures will be available to test the constitutionality of applications of particular sections of the Act to particular persons in particular situations. Nothing justifies previsioning those issues now."

Plaintiffs allege that they wish to travel abroad for recreation and study in pursuit of their profession as writers. They contend that section 6 of the Act is unconstitutional as applied to them for the following reasons:

(1) Plaintiffs are deprived without due process of law of their constitutional liberty to travel abroad, in violation of the Fifth Amendment to the Constitution of the United States;

(2) Plaintiffs' rights to freedom of speech, press and assembly are abridged in violation of the First Amendment.

(3) A penalty is imposed on plaintiffs without a judicial trial, and therefore constitutes a bill of attainder, in violation of article I, section 9 of the Constitution;

(4) Plaintiffs are deprived of the right to trial by jury as required by the Fifth and Sixth Amendments and article III, section 2, clause 3 of the Constitution; and

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(5) The action of the Secretary of State under section 6 constitutes imposition of a cruel and unusual punishment in violation of the Eighth Amendment.

The defendant admits all the material facts as alleged by the plaintiffs but denies that section 6 is unconstitutional. The defendant contends that the disqualification imposed by section 6 is a valid regulatory device, reasonably drawn to meet the dangers of foreign subversion and that it does not effect punishment for past activity but rather that it is a regulation of the activities of present members of the Communist Party necessary for the preservation of the Government.

It is admitted by both parties that if either plaintiff terminates his or her membership in the Communist Party that section 6 will no longer apply to him or her. They also agree that it would be a futile act for either plaintiff to apply for a passport or renewal of a passport until such membership is terminated. Indeed such application would be unlawful under section 6 of the Act as quoted above.

There is no contention that the administrative procedures provided by the defendant for determining plaintiffs' membership in the Communist Party were in any way inadequate or violated procedural due process.

The plaintiffs pray that the defendant be enjoined from enforcing section 6 of the Act and that defendant be ordered to reissue to each of them a valid United States passport.

The sole question to be decided by this Court is the constitutional validity of the section in question as applied to the facts of these cases. In order to properly decide this question it is necessary to view the enactment of the Subversive Activities Control Act of 1950 in its proper context.

In 1948 a Congressional Committee found that legislation was needed to

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“ . . . cut the threads which bind the international Communist conspiracy together by restricting travel of members of the American section of the World Communist Movement.”

H. R. 1844, 80th Cong., 2d Sess., dated April 30, 1948. The same thought was expressed in the debates which preceded enactment of the Internal Security Act of 1950, 64 Stat. 987 *et seq.*, 50 U. S. C. 781 *et seq.*, 94 Cong. Rec. 5850 and 5851; H. R. 2981, 81st Cong. 2d Sess., dated August 22, 1950.

The Congress found in Section 2(1) of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781(1), that

“ [t]here exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a worldwide Communist organization.”

The Congress also found in Section 2(6) of the Act that

“ [t]he Communist action organizations so established and utilized in various countries, acting under such control, direction and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. . . .”

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The Congress further found in Section 2(8) of the Act that

“[d]ue to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.”

The Congressional findings contained in the 1950 Act are binding on this Court. As the Supreme Court stated in the case of *Communist Party v. Control Board, supra*, at 94-95, with respect to the Congressional findings relating to the nature of the world Communist movement and the threat it poses to the security of the United States:

“It is not for the courts to re-examine the validity of these legislative findings and reject them. See *Harisiades v. Shaughnessy*, 342 U. S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half. [Footnote omitted.] Cf. *Nebbia v. New York*, 291 U. S. 502, 516, 530. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 U. S. 522, 529; *American Communications Assn. v. Douds*, 330 U. S. 382, 388-389.
* * *

In interpreting these same cases cited above, the Court of Appeals for the District of Columbia Circuit has stated:

“The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt those findings.” *Communist Party v.*

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Subversive Activities Control Board, 223 F. 2d 531, 565 (1954).

The plaintiffs nevertheless argue that the findings made by the Congress in the Subversive Activities Control Act of 1950 as to the dangers threatening our Government by the world Communist movement, and upheld by the Supreme Court in *Communist Party v. Control Board*, *supra*, were made some thirteen years ago and may not be considered binding on the courts at this time. There has been no evidence offered or adduced that the "leopard" of the world Communist movement has changed a single spot in the past thirteen years nor would common sense nor common knowledge indicate any such change.

In addition, section 13(b) of the Act, 50 U. S. C. §792(b), contains the procedure whereby an organization which has been required to register by a final order of the Subversive Activities Control Board may seek the cancellation of such registration. On proper showing, the Board could cancel their prior registration order and the members of the organization would be under no impediment as to the use or issuance of passports. To our knowledge, the Communist Party has not sought to utilize the procedures under section 13 (b).

The findings of the Congress made in section 2 of the Subversive Activities Control Act of 1950 are therefore as valid and as binding on this Court today as on the day on which they were made. It is in the light of these congressional findings that the plaintiffs' claims of unconstitutionality of section 6 of the Act must be judged.

Denial of a passport to a citizen is a denial of the right to travel outside the United States. *Worthy v. Herter*, 270 F. 2d 905 (D. C. Cir., 1959), *Cert. den.*, 361 U. S. 918. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent v. Dulles*, 357 U. S. 116, 125

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(1958). The Supreme Court further noted in *Kent* that "[i]f that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129. The Supreme Court in *Kent* did not review the constitutionality of the restrictions on travel involved in that case. It merely held that the Secretary of State did not have the authority to deny passports to citizens because of their alleged Communistic beliefs and associations and their refusal to file affidavits concerning their membership in the Communist Party when sections 2 and 6 of the Subversive Activities Control Act had not yet become effective. The Court said it would be

"strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to t[ri]bble in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations." *Id.* at 130.

It is clear in the present case that certain liberties of these plaintiffs, as alleged by them in their brief in these consolidated cases and in oral argument before this Court, are being restricted. Restriction or regulation of liberty, however, by no means indicates constitutional invalidity of the regulatory scheme. As the Supreme Court stated in *Communist Party v. Control Board*, *supra*, at 96-97,

"Individual liberties fundamental to American institutions are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers. But where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combina-

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tion of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods. Especially where Congress, in seeking to reconcile competing and urgently demanding values within our social institutions, legislates not to prohibit individuals from organizing for the effectuation of ends found to be menacing to the very existence of those institutions, but only to prescribe the conditions under which such organization is permitted, the legislative determination must be respected. *United Public Workers v. Mitchell*, 330 U. S. 75; *American Communications Assn. v. Douds*, *supra*."

In the *Douds* case cited, the Court upheld the validity of Section 9(h) of the National Labor Relations Act which denies the benefits of certain provisions of that Act to labor organization officers who have not filed non-Communist affidavits. The opinion, 339 U. S. at 390-91, states, "We think it is clear, in addition, that the remedy provided by § 9(h) bears reasonable relation to the evil which the statute was designed to reach."

Such is the case here. In view of the findings by the Congress set forth above, we hold that the enactment by Congress of section 6, which prohibits these plaintiffs from obtaining passports so long as they are members of an organization—in this case the Communist Party—under a final order to register with the Attorney General, see 50 U. S. C. § 786(a), is a valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regulatory scheme bears a reasonable relation thereto. Under circumstances such as these, our basic

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system of democracy permits the reasonable deprivation of the liberty of certain of its citizens who are brought within the proscriptions of a legislative determination by due process of law. We further hold that the deprivation of liberty, such as it is as applied to these plaintiffs, is not a cruel and unusual punishment in violation of the Eighth Amendment, but is rather a reasonable regulation of conduct which bears a direct relation to the evil Congress has found inimical to the interests of the United States as a sovereign nation. See section 2(8) of the Act quoted above.

It is argued that substantive due process of law is denied the plaintiffs herein because section 6 of the Subversive Activities Control Act requires the denial of a passport upon a mere finding that the plaintiffs are members of the Communist Party and because the Act does not go further and require a determination that the plaintiffs do not wish to travel abroad simply for personal reasons of pleasure and recreation, but that they in fact intend to travel abroad for the additional purpose of carrying on activities to further the purposes of the world Communist movement. In other words, the plaintiffs argue that Congress may not conclusively presume that the plaintiffs, who have admittedly been lawfully determined to be members of the Communist Party, which in turn has lawfully been determined to be a Communist-action organization as defined in section 3 (3) of the Act, 50 U. S. C. § 782(3), will act as members of the Communist Party while travelling abroad. They say the defendant-Secretary must presume that they are travelling for purely innocent purposes unless procedures are provided for determining their thoughts and intentions and it is affirmatively found that it is their thought and intention to act as members of the Communist Party and to carry on activities while abroad to further the purposes of the world Communist movement.

We hold that for Congress conclusively to presume that a member of a Communist-action organization while travel-

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ling abroad will act like a member of such an organization as defined by the statute—by carrying on activities to further the purposes of the world Communist movement which presents “a clear and present danger to the security of the United States and to the existence of free American institutions,” section 2(15) of the Act, 50 U. S. C. § 781(15)—is not so unreasonable as to violate the plaintiffs’ constitutional rights. We so hold in light of the Congressional findings set forth in section 2 of the Act, mindful of the peculiar and fundamental nature of those findings, and in light of the lawful procedures set forth in the Act, and followed in these cases before us, for determining whether an organization is a Communist-action organization and whether the individual citizens involved are knowingly members of such an organization.

The record in these cases, furthermore, shows that the plaintiff Flynn joined the Communist Party in 1937, has been a member of the National Committee of the Communist Party since 1938, and is currently the Chairman of the Communist Party of the United States of America. The plaintiff Aptheker joined the Party in 1939 and is presently Editor of *Political Affairs*, the self-described “theoretical organ of the Communist Party” of the United States. These facts are undisputed for purposes of the motions for summary judgment before this Court on review of the administrative proceedings below. Thus these plaintiffs clearly have meaningful associations with the Communist Party in this country, to say the least. This fact negates, in these cases, any unknowing or naive relationship with the organization under a final order to register with the Attorney General of which these plaintiffs are members. The Congressional presumption therefore retains a notable vitality. See *Gastelum-Quinones v. Kennedy*, 31 U. S. L. Week 4637 (U. S. June 17, 1963); *Rosoldt v. Perfetto*, 355 U. S. 115, 120 (1957); *Galvan v. Press*, 347 U. S. 522, 528 (1954).

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The plaintiffs contend that section 6 is a bill of attainder, but as was said in the *Douds* case, 339 U. S. at 413-14:

“* * * in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9(h) is intended to prevent future action rather than to punish past action.

“This distinction is emphasized by the fact that members of those groups identified in § 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past.” [Emphasis in original.]

The same situation exists here. Section 6 would not be a bar to the issuance or use of a passport if the plaintiffs renounced their present membership in the Communist Party. See also *Trop v. Dulles*, 356 U. S. 86, 95 (1958); *United States v. Lovett*, 328 U. S. 303, 315 (1946); *Cummings v. Missouri*, 71 U. S. (4 Wall.) 356, 363 (1866).

In the instant case the restriction is not as severe as that in the *Douds* case, where the individuals were “subject to possible loss of position.” Here, the plaintiffs are free to travel throughout the United States and most of the Western Hemisphere. The limitation on their right to travel is restricted to those countries which require a United States citizen to have a passport to enter their borders.

It was also stated in *Communist Party v. Control Board*, 367 U. S. 1, 86-87,

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"The [Subversive Activities Control] Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage. * * * Present activity constitutes an operative element to which the statute attaches legal consequences * * *"

It is clear to this Court that section 6 of the Act is not penal nor is it a bill of attainder. It is instead a legitimate exercise of the authority of Congress to regulate the travel of members of Communist organizations, based on the legislative determination that such travel would be inimical and dangerous to the security of the United States.

We therefore hold that the Constitution does not prohibit the denial of passports to plaintiffs as present members of a Communist organization under section 6 of the Subversive Activities Control Act of 1950.

Defendant's motions for summary judgment are granted as to each case.

The plaintiffs' motions for summary judgment in each case are denied.

The plaintiffs' requests for permanent restraining orders against the defendant are denied.

s/ **Leonard P. Walsh**
LEONARD P. WALSH

July 12, 1963

APPENDIX B—Judgment Below
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 3478-62

ELIZABETH GURLEY FLYNN,

Plaintiff,

v.

THE SECRETARY OF STATE,

Defendant.

CIVIL ACTION No. 3886-62

HERBERT APTHEKER,

Plaintiff,

v.

THE SECRETARY OF STATE,

Defendant.

ORDER

The cause having come before the Court on cross-motions of the parties for summary judgment, and the Court having considered all of the pleadings and exhibits, filed and having heard the oral argument of counsel for each side, and the Court on July 12, 1963, having issued and filed its opinion, it is therefore by the Court this 2nd day of August, 1963:

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ORDERED that plaintiffs' motions for summary judgment as to each case be, and the same hereby are, denied; and that plaintiffs' requests for permanent restraining orders against the defendant be, and the same hereby are, denied; and it

FURTHER ORDERED that the defendant's motions for summary judgment as to each case be, and the same hereby are, granted, and that the actions be, and the same hereby are, dismissed, with costs to the defendant.

s/ WARREN E. BURGER
*United States
Circuit Judge*

s/ G. L. HART, JR.
*United States
District Judge*

s/ LEONARD P. WALSH
*United States
District Judge*

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 461

**HERBERT APTHEKER AND ELIZABETH GURLEY FLYNN,
APPELLANTS**

v.

THE SECRETARY OF STATE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

MEMORANDUM FOR APPELLEE

The sole issue on these appeals is the constitutionality of Section 6 of the Subversive Activities Control Act of 1950, as amended, 64 Stat. 993, 50 U.S.C. 785. Section 6 makes it unlawful for any member of a registered Communist organization, or of an organization against which there is in effect a final registration order of the Subversive Activities Control Board, to apply for a passport or to use or attempt to use any passport. Section 6 also makes it unlawful for any officer or employee of the United States to issue a passport to any person whom he knows to be a member of such an organization.

The passports of appellants, whose membership in the Communist Party is uncontested, were revoked by the appellee on the ground that their use would

violate Section 6 of the Act. Appellants then brought the present actions to have Section 6 declared unconstitutional, to enjoin its enforcement and to have their passports reissued. The three-judge district court unanimously held that the provision was "a legitimate exercise of the authority of Congress to regulate the travel of members of Communist organizations, based on the legislative determination that such travel would be inimical and dangerous to the security of the United States" (Juris. St. 30). Accordingly, it granted appellee's motions for summary judgment.

While it is our firm position that the district court's decision was correct, we agree that this Court has jurisdiction and that the question presented by these cases is substantial. Consequently, we do not oppose the noting of probable jurisdiction.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

OCTOBER 1963.

agc
Office Supreme Court, U.S.

FILED

JAN 27 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1963

No. 461

HERBERT APTHEKER and ELIZABETH
GURLEY FLYNN,

Appellants,

v.

THE SECRETARY OF STATE

On Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

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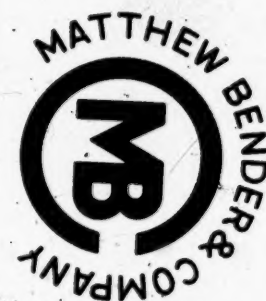
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IN THE
Supreme Court of the United States

October Term, 1963

No. 461

HERBERT APTHEKER and ELIZABETH GURLEY FLYNN,
Appellants,

v.

THE SECRETARY OF STATE.

On Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

Opinion Below

The opinion below (R. 42) is reported in 219 F. Supp.
709.

Jurisdiction

The judgment below (R. 54) was dated and entered on August 2, 1963. Each appellant filed a notice of appeal in the court below on August 9, 1963 (R. 55, 56). The Court noted probable jurisdiction on December 2, 1963 (R. 57).

The District Court had jurisdiction under D. C. Code, secs. 11-305 and 11-306; 28 U. S. C. 2201, 2282 and 2284; and sec. 10 of the Administrative Procedure Act, 5 U. S. C. 1009.

Jurisdiction of this appeal is conferred on the Court by 28 U. S. C. 1253.

Statute Involved

The relevant provisions of the Subversive Activities Control Act of 1950, as amended (herein called the Act), are set forth in the Appendix to this brief.

Question Presented

Whether section 6 of the Subversive Activities Control Act, 64 Stat. 993, 50 U. S. C. 785, is unconstitutional, on its face or as applied.

Statement of the Case

This appeal is from a final order (R. 54) of a three-judge court of the United States District Court for the District of Columbia granting the motion of the Secretary of State (herein called the Secretary) for summary judgment, and dismissing appellants' complaints.¹ The complaints (R. 1, 16) sought judgments declaring section 6 of the Act unconstitutional, enjoining the Secretary from continuing in effect his revocation of appellants' passports, and requiring him to reissue passports to them.

The relevant facts are not in dispute (R. 45).

Appellants are citizens of the United States by birth and on January 21, 1962, were the holders of United States passports (R. 1, 5, 7-8, 17, 20, 23).

On April 20, 1953, the Subversive Activities Control Board (herein called the Board) issued an order requiring the Communist Party of the United States to register as a Communist-action organization under section 7 of the Act. This order became final on October 20, 1961 (R. 43). See *Communist Party v. S. A. C. B.*, 367 U. S. 1 (herein some-

¹ Appellants commenced separate actions which were consolidated in the court below (R. 32).

times called the *Party* case), rehearing denied, Oct. 9, 1961, 368 U. S. 871; Act, sec. 14(b)².

Section 6(a) of the Act makes it unlawful for a member of an organization to apply for or use a passport with knowledge or notice of the issuance of a final order requiring the organization to register as a Communist-action or Communist-front organization³. Section 6(b) makes it unlawful for an officer or employee of the United States to issue a passport to any person who he knows or has reason to believe is a member of an organization which has been finally ordered to register as a Communist-action organization. Each of these offenses is punishable by imprisonment for five years and a fine of \$10,000. Sec. 15(c).

On January 22, 1962, the Acting Director of the Passport Office notified appellants that their passports were revoked because the Department of State believed that their use of the passports would violate section 6 (R. 11-12, 26). Appellants requested administrative review of this action pursuant to Departmental regulations, 22 C. F. R. Chap. 1, Part 51 (R. 14, 29, 35, 36-37).

At the administrative hearings, the Department introduced evidence that each appellant was a member of the Communist Party and had notice of the issuance of the final registration order against it by virtue of the publication of that fact in the Federal Register. Appellants offered no

² Under section 14(b), the Board's order became final ten days after the mandate in the *Party* case issued. The mandate issued on October 10, 1961.

³ Section 6 uses the term "Communist organization," which is defined by section 3(5) to include Communist-action, Communist-front and Communist-infiltrated organizations. However, Communist-infiltrated organizations are not subject to a registration requirement. See sec. 7. The notice requirement of section 6(a) is satisfied by publication in the Federal Register of the fact that the registration order in question has become final. Sec. 13(k). Notice of the finality of the registration order against the Communist Party was published in the Federal Register on October 21, 1961.

evidence (R. 44, 34). The hearings were followed by decisions of the Director of the Passport office affirming the revocations (R. 12-14, 27-28).

Appeals to the Board of Passport Appeals resulted in a finding in each case that "there is a preponderance of evidence in the record to show that at all material times [each appellant] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act." On the basis of these findings, the Board recommended affirmance of the decisions of the Passport Office. The recommendations were approved by the Secretary on October 18, 1962 (Flynn) and November 23, 1962 (Aptheker). The Secretary ~~adopted~~ the finding as to each appellant quoted above and confirmed the revocations on the ground that use of the passports by appellants would violate section 6 (R. 14-16, 29-31, 44).

Dr. Aptheker is a well-known scholar in the fields of history, political science and sociology. At the time of the administrative hearing, he was editor of *Political Affairs*, the theoretical organ of the Communist Party. He is the author of fourteen books and has edited or contributed to several others, including the official History of the Army Ground Forces in World War II. He is also the author of some thirty pamphlets and numerous articles and reviews in scholarly journals. He has lectured at many universities, colleges and other forums. In 1959 and 1960, he visited Europe, where he lectured before various learned academies and universities. In 1961, he delivered papers before the Japanese Historical Society in Tokyo. The revocation of his passport has prevented him from accepting invitations to attend a world gathering of historians at Dresden, to deliver a series of lectures on the American Civil War at Humboldt University, and to attend a conference of scholars in Accra for a discussion of the projected *Encyclopedia Africana*. His inability to travel to Europe also has denied him access to overseas archives and depositories needed for

his historical works, including further volumes of the *History of the American People*, the first two volumes of which have been published (R. 7-9).

Dr. Aptheker desires to travel to Europe and elsewhere to pursue his historical studies, attend meetings of scholars and learned societies, exchange opinions with fellow historians, lecture at foreign universities, and observe conditions and gather material for his writing and lecturing in this country (R. 9-10).

The court below found on the basis of the administrative record that Miss Flynn was chairman of the Communist Party (R. 52). For many years, she has written a weekly column for the newspaper, *The Worker* (formerly *The Daily Worker*), under her by-line. She is the author of two books, including the first volume of a planned two-volume autobiography. She lectures extensively throughout the United States. She has made a number of trips to Europe and desires to travel there again for rest and recreation, to gather material for use in writing for and speaking to American audiences, and to lecture to European audiences (R. 23-24).

The denial of passports to appellants makes their travel unlawful (R. 49; *infra*, p. 12). Because of the basis for the Secretary's action, it would be futile for appellants to apply for new passports. Moreover, any such application would invite criminal prosecution for violation of section 6 (R. 3, 5-6, 18, 21, 46).⁴

⁴ The passports which the Secretary revoked would have expired by their terms on December 9, 1962 in the case of Dr. Aptheker and on March 9, 1963 in the case of Miss Flynn (R. 44, 36, 37). No claim of mootness on that account has been made, or would be warranted. The controversy as to the validity of section 6 and the determination of the Secretary that appellants are ineligible for passports still remain. Mootness is precluded by the short-term license or order doctrine. *Motor Coach Employees v. Missouri*, 374 U. S. 74, 78; *Ford Motor Company v. United States*, 335 U. S. 303, 313; *Southern Pac. Term. Co. v. I.C.C.*, 219 U. S. 498, 514-15. The doctrine is fortified here by the fact that under section 6 appellants cannot reapply for passports without facing criminal prosecution.

The sole ground advanced below for appellants' challenge of the Secretary's action was that section 6, on its face and as applied to them, is unconstitutional (R. 3, 18, 46). Because of the constitutional issue and the requests of appellants for injunctions requiring the Secretary to reissue passports to them, a three-judge court was convened, with the consent of the Secretary, pursuant to 18 U. S. C. 2282 and 2284 (R. 43).⁵

The *Party* case held (at 79) that it was premature, on review of the Board's registration order, to consider any of the provisions of the Act other than the registration requirement. The Court stated (*ibid.*), "It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport." Pointing out that if such application were made, appropriate procedures would be available to test the constitutional issues, the Court concluded, "Nothing justifies provisioning those issues now." Accordingly, this appeal presents one of the constitutional questions reserved in the *Party* case.

⁵ The injunctions sought by appellants on the ground of the unconstitutionality of section 6 would restrain its enforcement, operation and execution by requiring the Secretary to reissue passports to appellants without regard to whether they are members of the Communist Party and notwithstanding that he has reason to believe that they are, as he found, members of the Communist Party. A three-judge court was therefore required. *Schneider v. Rusk*, 372 U. S. 224; *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713; *Florida Lime Growers v. Jacobsen*, 362 U. S. 73; *Bauer v. Acheson*, 106 F. Supp. 445. Cf. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-55.

Summary of Argument

1.

United States citizens are prohibited from travelling outside of the Western Hemisphere without a passport, and for the most part may not enter foreign countries without a passport. Accordingly, the denial of a passport is a denial of the right to travel.

"The right to travel is a "liberty" of the citizen, protected by due process. Section 6 must, therefore, comply with the due process requirements that a deprivation of liberty shall not be arbitrary and that the means selected shall have a real and substantial relation to the object sought to be obtained.

The asserted objective of section 6 is to safeguard the national security by closing off a means of communication between American and foreign Communists, found to be a prerequisite to the success of supposed designs of the world Communist movement against our government. There are no legislative findings or facts which could justify section 6 as a regulation of foreign relations.

A.

Section 6 establishes a conclusive presumption that all members of proscribed organizations, simply because of their membership, will be likely to engage in unlawful activity whenever they travel abroad. This irrebuttable presumption is not credible. It is an extreme example of the imputation of guilt from association. Its premise that every member of the Communist Party promotes alleged criminal activity of the Party is contradicted by the dispositions of numerous Smith Act cases in favor of the defendants, and by the fact that the registration proceeding against the Party produced no finding or evidence that the Party engages in illegal acts or advocacy.

Since the conclusive presumption of section 6 is irrational and contrary to common experience, it violates due process and the rule that legislatures may not declare individuals guilty or presumptively guilty of crime.

B.

Section 6 applies despite the absence of guilty knowledge, guilty intent, or even organizational activity of the individual affected. Nor may the individual rebut the presumption against him arising from the fact of membership. This indiscriminate, un rebuttable disqualification contravenes decisions of this Court establishing that individual guilt or disqualification may not be conclusively presumed merely from the fact of membership in the Communist Party or organizations considered to be Communist oriented.

C.

The executive and legislative experience show that the conclusive presumption of ~~section 6~~ is not required by security considerations. This appears from the views expressed by the Department of Justice to the House Committee which was considering the bills that eventuated in the Act and from the federal employee security program under which membership in the Communist Party is only one factor to be considered in deciding whether an employee is disqualified. The approach of the employee security program was taken in passport legislation proposed by the administration following the decision in *Kent* and in the bills then introduced, including one which passed the House.

Section 6 does not represent a considered Congressional judgment to the contrary, but reflects the misapprehension which prevailed before *Kent* that there were no constitutional limitations on the government's power to withhold passports.

D.

Section 6 would violate due process even if its presumption, that all members of proscribed organizations are security risks, were reasonable. The right to travel being a constitutional liberty, it may not be taken from a citizen, at least in peacetime, merely because of the apprehension that he may engage in unlawful activity.

Denial of the right to travel in anticipation of future misconduct is a form of preventive detention, a practice which is repugnant to the presumption of innocence. Moreover, preventive detention under section 6 is imposed without a jury trial, or a judicial or even an administrative finding that the detainee has criminal propensities. Under our system, freedom of movement may not be denied for the purpose of preventing anticipated commission of crime even to one charged with crime or to aliens under deportation orders. No other major Western democracy imprisons its Communists within its borders, and to do so is contrary to the Universal Declaration of Human Rights.

If preventive detention of Communists and suspected Communists within the country is sustained, there will be no constitutional barrier to their exclusion from interstate travel, their house arrest, or their confinement in concentration camps, all without trial and conviction for the commission of an offense. And these measures can then be applied to other political dissenters.

E.

The Act's justification of section 6 rests on findings that foreign travel by Communists is a prerequisite to the carrying on of activities to further the aims of the world Communist movement, and that the Communist organization in the United States engages in conduct which creates a clear and present danger to the national security.

In the registration proceeding against the Communist Party, the conclusion of the Subversive Activities Control Board that the Party furthers the objectives of the world

Communist movement did not rest on any findings or evidence of foreign travel by American Communists, but rested on findings having nothing to do with travel. Moreover, since the Board did not find that the Party engaged in any unlawful acts or advocacy, the Party's conduct cannot endanger the national security.

Thus, as far as the Communist Party is concerned, the legislative findings are belied by the findings and evidence in the proceeding before the Board. Accordingly, as applied to members of the Communist Party, section 6 effects a purposeless, and therefore invalid, deprivation of liberty.

II.

Section 6 imposes a direct and prior restraint on speech and press by preventing American Communists from communicating with foreign Communists, by preventing appellants and others from acquiring knowledge and ideas abroad, and by restraining appellants from gathering material abroad for communication to domestic audiences. Section 6 also restrains conduct within the ambit of the First Amendment by discouraging association in organizations engaged in advocacy.

A.

Legislation in the First Amendment area is invalid unless the restraint is no broader than the abuse to which it is directed. Section 6 violates this principle because it applies to all Communists regardless of the innocent purpose of their travel and despite the absence of guilty intent, guilty knowledge, and organizational activity.

B.

The section abridges the First Amendment rights of non-Communist members of organizations which have been ordered to register as Communist-fronts. It likewise applies to all persons who may be found to be members of proscribed organizations under such vague and expansive indicia of membership as are contained in section 5 of the

Communist Control Act. Again, section 6(b) compels the Secretary to deny passports to individuals who are not members merely because he has "reason to believe" that they are members. Section 6 also inhibits persons from associating with organizations against which registration proceedings are pending or possible. And by preventing members of proscribed organizations from acquiring information and ideas abroad, the section deprives their potential audiences of the right to hear.

C.

The *Douds* case is inapplicable. The statute sustained in *Douds* had only a tangential effect on First Amendment rights; it involved merely a possible loss of position; it applied only to a few members of proscribed organizations who occupied positions of great power over the economy. In contrast, section 6 directly restrains First Amendment rights, effects a deprivation of "liberty" in the constitutional sense, applies to all members of proscribed organizations, and affects many non-members. Furthermore, in *Douds*, the Court found no basis for questioning the Congressional findings made to justify the legislation. The findings justifying section 6, however, have been negated as to the Communist Party by the Board findings in the registration proceeding against the Party.

III.

The denial of passports to appellants in 1962 was predicated on the 1953 finding that the Communist Party was then a Communist-action organization. Section 6(b) makes that finding conclusive on persons desiring passports and thereby violates the principle of procedural due process that persons may not be deprived of liberty without an opportunity to contest the factual premises on which the validity of the deprivation depends.

Even if appellants are foreclosed from contesting the validity of the 1953 finding, they were entitled at a minimum

to an opportunity to prove that the finding is no longer tenable. Section 6(b) denies any such opportunity.

Since the Communist Party has not registered (and, in all likelihood will not, and cannot be compelled to, register), the Act affords no procedure for a redetermination of the Party's status in the light of changed circumstances. Hence the finding against the Party binds its members in perpetuity for the purposes of section 6(b). The section is therefore a bill of attainder as applied to members of the Party.

ARGUMENT

I. On its face and as applied, section 6 of the Act violates substantive due process.

United States law prohibits citizens from travelling outside of the Western Hemisphere without passport.⁶

⁶8 U. S. C. 1185(b) provides that while a prescribed Presidential Proclamation is in force, "it shall, except as otherwise prescribed by the President * * * be unlawful for any citizen of the United States to depart from or enter * * * the United States unless he bears a valid passport." The prescribed proclamation, Proclamation No. 3004, 67 Stat. C. 31, 18 F. R. 489, made January 17, 1953, remains in force. Among other things, it provides that, "The departure and entry of citizens and nationals of the United States from and into the United States * * * shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations * * * and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require." 22 C. F. R. 53.2 prohibits citizens from departing the United States unless they come within one of the exceptions prescribed by § 53.3. The latter excepts all travel by specified classes of persons (seamen, air crewmen, members of the armed forces and certain minors) and all persons when travelling between the United States and any country in North, Central or South America, other than Cuba. The denial of a passport may likewise prohibit travel within the hemisphere. 22 C. F. R. 53.5 reserves to the Secretary authority to prevent a citizen from departing without a passport, notwithstanding that the latter is destined for a place for which a passport is not required.

Under foreign laws, passports are required of United States citizens for entry into countries outside of this hemisphere and for extended stays in countries within the hemisphere.⁷ Accordingly, denial of a passport is a prohibition of foreign travel. *Kent v. Dulles*, 357 U. S. 116.

Kent established that the right to travel abroad is protected by due process. The Court stated (at 125-26):

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. * * * Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."

Accordingly, section 6 must satisfy the requirements of substantive due process that a deprivation of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia v. New York*, 291 U. S. 502, 525; *Schwabe v. Board of Bar-Examiners*, 353 U. S. 232, 238-39.

The "object sought to be obtained" by section 6 is stated in section 2 of the Act. Section 2(1) recites that there exists a world Communist movement; which seeks by unlawful methods "and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." Sections 2(5) and (6) find that the world movement establishes and controls Communist-action organizations in various countries whose purpose it is to bring about "the overthrow of existing governments by any available means, including

⁷ See Department of State circulars M-317 and M-264.

force if necessary," and to replace them with "Communist totalitarian dictatorships." Section 2(15) concludes that the "Communist organization in the United States" and the world Communist movement "present a clear and present danger to the security of the United States," necessitating enactment of the legislation.

Against this background, section 2(8) states the justification for section 6 as follows:

"Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement."

In short, the stated purpose of section 6 was to safeguard the national security by closing off a means of communication between American and foreign Communists which, Congress found, was a prerequisite to the success of the supposed designs of the world Communist movement.

Congress made no finding, and there is no evidence, that travel abroad by American Communists endangers or embarrasses our relations with other countries or otherwise interferes with the management of our foreign affairs. It follows that section 6 cannot be justified as a regulation of foreign relations.* For due process purposes, the section must be judged by its relation to what Congress stated was the intended objective.

In what follows we will show that section 6, on its face and as applied, violates substantive due process because

* Contrast *Perez v. Brownell*, 356 U. S. 44 (statute expatriating citizens who vote in foreign elections upheld as valid regulation of foreign relations); *Worthy v. Herter*, 270 F. 2d 905 (authority of Secretary of State to invalidate passports for travel to Cuba sustained as incident to power of the executive over foreign relations).

it imposes an arbitrary and irrational restraint on personal liberty having no substantial relation to considerations of national security.

A. There is no rational basis for the conclusive presumption of section 6 that members of the proscribed organizations will be likely to endanger the national security if permitted to travel abroad.

Section 6 denies a passport to any person who (1) is a member of an organization against which a final order has issued requiring it to register as a Communist-action or Communist-front organization; and (2) who has "knowledge or notice" of such order. The second requirement is satisfied by publication in the Federal Register of the fact that the order in question has become final. Sec. 13(k). Section 6, therefore, bars individuals from travel abroad solely because of their membership in a described organization.

It is irrelevant under section 6 that the member does not know or believe that the organization is a Communist-action or Communist-front organization as defined in the Act and found by the Board. It is likewise irrelevant that the member has not engaged, and does not intend to engage, in any of the unlawful activity which the Act attributes to the world-Communist movement. Indeed, the member need not have engaged in organizational activity of any kind. Moreover, the section applies to a member irrespective of the purpose of his proposed travel. So here, appellants, who seek to travel for the lawful purposes described in their affidavits (R. 9-10, 24), have been denied that right solely because of the findings that they are members of the Communist Party.

Section 6 thus establishes a presumption that all members of proscribed organizations, simply because of their membership, will be likely to engage in unlawful activity endangering the national security whenever they travel

abroad. This presumption is an extreme example of the imputation of guilt from association. From the bare fact of organizational membership, section 6 imputes the propensity, the capacity and the opportunity to promote conspiratorial activity for forcible overthrow of the government. All this is imputed not only to officers of the Communist Party but to each of its members and to non-Communist members of Communist-front organizations.

Moreover, the presumption is conclusive. The individual is not permitted to rebut it by establishing that, notwithstanding his membership, he is a loyal, law-abiding citizen and that the purpose of his travel is innocent. Section 6 does not even give the Secretary a measure of administrative discretion which might, for example, permit the issuance of a passport for a last visit to a dying parent or for medical care unobtainable in this country.⁹ Instead, a State Department employee who yields to any such humanitarian impulse is liable to conviction and imprisonment for five years. Secs. 6(b) and 15(c).¹⁰

The irrebuttable presumption which section 6 establishes is not credible, is contrary to experience, and is unnecessary to meet the alleged evil. It has no "reasonable relation to the circumstances of life as we know them." *Tot v. United States*, 319 U. S. 463, 468. Communists, like other citizens, travel abroad for recreation, study, business and professional purposes, to visit relatives and friends, to broaden their cultural horizons, and for many other reasons. It is irrational to assume that every Communist who travels

⁹ Cf. the permission that was granted to William Z. Foster to travel to the Soviet Union for medical treatment while he was under indictments for violating the Smith Act. *Foster v. United States*, 364 U. S. 834, was followed by an order of the District Court permitting such travel. Order of Dec. 2, 1960, in Nos. CR 128-87 and CR 128-88, S.D.N.Y.

¹⁰ Sections 6(a) and 15(c) make the applicant similarly liable for the act of applying.

abroad does so to further the purposes of the world Communist movement.¹¹ It is equally irrational to presume that those Communists who travel abroad in furtherance of such purposes will or are likely to engage in or promote unlawful activity.¹² "Communists, we may assume, carry on legitimate political activity." *American Communications Association v. Douds*, 339 U. S. 382, 393: "Assuming that some members of the Communist Party * * * had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct." *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, 246. Accordingly, the Court has warned of the danger of punishing a member of the Communist Party "for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not share." *Noto v. United States*, 367 U. S. 290, 299. See also *Yates v.*

¹¹ It is likewise irrational to assume, as section 6 does, that all foreign travel by non-Communist members of Communist-front organizations is for this purpose. The latter presumption is not even supported by the findings of section 2(8) which refers only to travel by "Communist members, representatives, and agents." See *infra*, p. 43.

¹² Appellant Flynn has written of her participation, in 1960, in a Bucharest meeting of the representatives of the Communist Parties of 50 countries and in the Moscow meeting of 81 Communist Parties. *Recollections of the 1960 Conferences*, Political Affairs, No. 1963, p. 22. The article describes the discussions which eventuated in the statement, subscribed to by 81 Communist Parties including the Communist Party of the United States, containing declarations on the non-inevitability of war and on the possibility of bringing about the transition from capitalism to socialism by peaceful means. The article tells of the efforts which were made to persuade the Chinese delegates of the correctness of the positions taken on these subjects. While Miss Flynn's participation in these meetings may be said to have furthered purposes of the world Communist movement, there is nothing in the proceedings which she describes other than legitimate, peaceable activity which, as to her, was of a constitutionally protected character.

United States, 354 U. S. 298, 329-31; *Scales v. United States*, 367 U. S. 203, 229-30.¹³

The supposition of section 6 that every member of the Communist Party promotes its alleged criminal activity is negated by the disposition of Smith Act prosecutions following the decision in *Yates*. Of thirteen conspiracy cases the defendants were discharged in twelve; the other is dormant after two reversals.¹⁴ Of fifteen membership cases, *Scales* alone resulted in a conviction; one ended in an acquittal,¹⁵ and thirteen were dismissed on motion of the government.¹⁷ No further Smith Act indictments have been returned.

¹³ Cf. *Schneiderman v. United States*, 320 U. S. 118, 136: "Men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

¹⁴ In four cases, judgments of acquittal were ordered as to all of the defendants. *United States v. Silverman*, 248 F. 2d 671; *United States v. Jackson*, 257 F. 2d 830; *Huff v. United States and Fujimoto v. United States*, 251 F. 2d 342. In *Yates* and one other case, judgments of acquittal were ordered for some defendants and the indictments were later dismissed by the government as to the others. *United States v. Kuzma*, 249 F. 2d 619. In four cases, the indictments were dismissed by the government after remands for new trials. *Mesarosh v. United States*, 352 U. S. 1; *Wellman v. United States*, 253 F. 2d 661; *Sentner v. United States*, 253 F. 2d 310; *Brandt v. United States*, 256 F. 2d 79. In two cases, the indictments were dismissed by the government before trial. *United States v. Russo* (D.C. Mass.); *United States v. Carrion* (D.C. P.R.).

¹⁵ *Bary v. United States*, 292 F. 2d 53.

¹⁶ *Hellman v. United States*, 298 F. 2d 810.

¹⁷ In *Noto*, *supra*, and two other cases, the indictments were dismissed after re-trials were ordered. *Lightfoot v. United States*, 355 U. S. 2; *United States v. Blumberg* (E.D. Pa.). In ten, the indictments were dismissed before trial. *United States v. Russo* (D.C. Mass.); *United States v. Weiss* (N.D. Ill.); *United States v. Winter*; *United States v. Hall*; *United States v. Thompson*; *United States v. Stachel*; *United States v. Davis*; *United States v. Green*; *United States v. Winston*; *United States v. Gates* (all S.D.N.Y.). Two additional cases terminated upon the death of the defendants. *United States v. Foster* and *United States v. Dennis* (both S.D.N.Y.).

The Act itself recognizes that the world Communist movement may seek to realize its alleged objective in the United States by peaceable, constitutional means. For section 2(6) finds that forcible means will be resorted to only "if necessary." And section 4(a) (50 U. S. C. 783(a)), prohibiting conspiracies to promote the establishment of a foreign-controlled "totalitarian dictatorship" in this country, contains the proviso that "this subsection shall not apply to the proposal of a constitutional amendment."

Finally, the registration proceeding against the Communist Party produced no finding and no evidence that the Party engaged in illegal acts or advocacy. See *infra*, pp. 35-36.

Plainly, as the authors of the Act themselves recognized, the presumption that all members of the Communist Party are likely to endanger the national security whenever they travel abroad is contrary to common experience. Accordingly, the presumption denies due process. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79; *Heiner v. Donnan*, 285 U. S. 312; *Tot v. United States*, *supra*; *Speiser v. Randall*, 357 U. S. 513; *Bailey v. Alabama*, 219 U. S. 219, 239. It also violates the precept of *McFarland*, at 86, that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

B. Section 6 contravenes the decisions of the Court that individual guilt or disqualification may not be conclusively presumed from membership in Communist organizations.

It is an established principle of due process that individual guilt or disqualification may not be conclusively presumed merely from the fact of membership in the Communist Party or organizations considered to be Communist oriented. *Scales v. United States*, *supra*; *Adler v. Board of Education*, 342 U. S. 485; *Wieman v. Updegraff*, 344 U. S. 183. Section 6 must fall under this principle.

Scales at 224-28, sustained the membership clause of the Smith Act only by construing it to require proof not merely that the accused was a member of an organization which incited to violent overthrow of the government, but also that he (1) had knowledge of the criminal activity of the organization, (2) was an "active" member, and (3) himself intended to bring about violent overthrow as soon as circumstances would permit. In answering the arguments of petitioner that the statute violates due process, the Court said (at 228):

"We think, however, they are duly met when the statute is found to reach only 'active' members having also a guilty knowledge and intent, which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action."

The Court also emphasized, at 229, that since the membership clause requires proof that the accused intended to bring about the overthrow of the government by forcible means, "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute."

Although *Scales* dealt with a criminal statute, the decision applies with equal force to the civil disability imposed by section 6. The section denies travel rights to all members of proscribed organizations, including those "for whom the organization is a vehicle for the advancement of legitimate aims and policies" and whose membership is "unaccompanied by any significant action . . . or any commitment to undertake action" in support of alleged unlawful objectives of the organization. Under *Scales* such an indiscriminate disqualification is inconsistent with due process.

Adler v. Board of Education, supra, sustained New York's Feinberg Law, which provided a procedure to dis-

qualify persons for employment in the public schools. The statute authorized the Board of Regents to list organizations found, after a hearing, to advocate the violent overthrow of the government. The statute, as construed by the state court, made membership in a listed organization evidence of disqualification only if the member was found to have knowledge of the organization's unlawful purpose (342 U. S. at 494, n. 8). Moreover, such evidence was not conclusive. The statute accorded the accused teacher a hearing at which he could rebut the *prima facie* presumption arising from his membership and knowledge. As the state court further construed the statute (342 U. S. at 495):

“Once such contrary evidence has been received
*** the official who made the order of ineligibility
has thereafter the burden of sustaining that order by
a fair preponderance of the evidence.”

Under the state court's interpretation, as this Court stated (at 492), the statute applied only to persons holding *unexplained* membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force and violence, and known by such persons to have such purpose” (emphasis, supplied). The Court held (at 495) that, so interpreted, the statute satisfied due process because the presumption of ineligibility arising from membership in the organization with knowledge of its unlawful purpose was not unreasonable and because, “The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it.” In short, the New York statute was found to meet the standards of due process only because it contained the protective features which are missing from section 6.

Wieman v. Updegraff, *supra*, invalidated a state statute which lacked these features. This statute required state employees, as a condition of employment, to declare under oath that they were not members of any organization which

had been listed as subversive by the Attorney General of the United States. The Court noted (at 189) that the disqualification in *Adler* was based on membership in a listed organization only when coupled with "knowledge of organizational purpose," whereas (at 190) under the Oklahoma statute, "the fact of membership alone disqualifies." It held this difference decisive of the unconstitutionality of the Oklahoma statute, stating (at 191):

" * * * under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. * * * Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

Petitioners' interest in foreign travel is certainly entitled at least to the protection accorded the interest of an individual in public employment.¹⁸ Accordingly, section 6 violates due process because of its "indiscriminate classification of innocent with knowing activity."

C. The executive and legislative experience shows that the conclusive presumption of section 6 is not required by security considerations.

The premise of section 6 is that every member of the Communist Party and of Communist-front organizations must be conclusively presumed to be a security risk. This conclusive presumption is not only arbitrary and in conflict with the decisions of this Court, but is also superfluous to security needs. The latter fact has been recognized by the executive and legislative branches of the government.

¹⁸ The interest in foreign travel should be accorded greater protection. For there is no "right" to public employment in the sense that there is a right to travel. Cf. *Wieman v. Updegraff*, *supra*, at 191-92, with *Kent v. Dulles*, *supra*, at 125-27. And see *infra*, p. 47.

In 1950, The Assistant to the Attorney General, Peyton Ford, wrote the Chairman of the House Committee which was considering the bills that eventuated in the Act.¹⁹ The letter dealt specifically with H. R. 3903, 81st Cong., 1st Sess., making it a crime for a person employed by the federal government or in the performance of a defense contract to be a member of the Communist Party or any organization designated by the Attorney General as subversive. However, the comments of the Department apply with equal force to the conclusive presumption of disloyalty established by section 6. Mr. Ford wrote:

¹⁹ The relevant provisions of the Order are set forth in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 125-29.

The fact that the executive branch does not consider the conclusive presumption of section 6 necessary for security purposes also appears from the passport legislation proposed by the administration after this Court decided the *Kent* case, *supra*, in June 1948. *Kent* left the Secretary without authority to deny passports to persons known or suspected of membership in or other association with the Communist Party.²⁰ A month after the decision, President Eisenhower sent a message to Congress requesting authority to deny passports where their possession "would be inimical to the security of the United States." The mes-

States. Section 104(c) provides that in determining whether an applicant is within the category defined in section 103(6)(iii), the Secretary shall consider as material whether he is a member of the Communist Party. Section 104(c) provided that if the evidence

Ten other bills to regulate the issuance of passports were introduced at the same session.²² Although differing in many respects, with a single exception, they did not make membership in the Communist Party or any other organization conclusive of the applicant's ineligibility for a passport.²³ The Senate took no action on any of these bills. One of them was passed by the House, H. R. 13760, 85th Cong., 2d Sess. (the Selden Bill). It authorized the denial of a passport to a member of the Communist Party only if the Secretary determined that travel by him would endanger the national security. In explaining his bill during the floor debate, Representative Selden emphasized that "the Secretary of State is required to make an affirmative showing that the activities or presence of the person abroad would be harmful to the security of the United States." 104 Cong. Rec. 19654.²⁴

at a hearing shows that the applicant is a member of the Communist Party, the burden is upon him to establish that he is not within the category defined in section 103(6)(iii). Section 105 authorized the Secretary to issue a passport notwithstanding the provisions of sections 103 and 104 where "he deems such action advisable in the national interest." For criticism of the administration bills, by Senators and others, as too harsh, see Hearings before the Committee on Foreign Relations, United States Senate, 85th Cong., 2d Sess., on S. 2770, S. 2998, S. 4110 and S. 4137, *passim*.

²² H.R. 13005, H.R. 13652, H.R. 13699, H.R. 13700, H.R. 13760, H.R. 13761, H.R. 13769, H.R. 13788, S. 2770 and S. 4137, all 85th Cong., 2d Sess.

²³ The exception was S. 2770.

²⁴ The text of the Selden Bill and floor amendments appear at 104 Cong. Rec. 19653-54. The bill was in the form of an amendment to the Passport Act of 1926, 44 Stat. 887. Section 5 found that the "international Communist movement" endangers the security of the United States and that "travel by couriers and agents is a major and essential means by which the international Communist movement is promoted and directed." Section 6 authorized the Secretary of State to deny a passport to any person who is a member of the Communist Party "as to whom it is determined [after the hearing provided for in section 8] that his or her activities or presence abroad would under the findings made in section 5 be harmful to the security of the United States."

A revised version of the Selden Bill was passed by the House at the next Congress. H. R. 9069, 86th Cong., 1st Sess.; 105 Cong. Rec. 18614. Section 6 of this bill specifically provided that, "The Secretary of State shall not deny a passport to any person solely on the basis of membership in any organization, association with any individual or group, adherence to unpopular views, or criticism of the United States or its domestic or foreign policies." The Senate took no action on passport legislation during the 86th Congress, and no further action was taken by either House at subsequent Congresses.

Thus in formulating passport legislation following the decision in *Kent*, the executive branch and the House adopted the view, expressed by The Assistant to the Attorney General in 1950, that the denial of rights or privileges to a member of the Communist Party solely because of his organizational association is not a necessary or desirable element of a national security program. Section 6 does not represent a considered Congressional judgment to the contrary. Instead it appears to reflect the misapprehension that prevailed before *Kent* that there were no constitutional limitations on the powers of Congress and the executive to withhold passports.²⁵

²⁵ The Senate Committee report on the bill that became the Act said with respect to section 6: "The granting of passports is not obligatory in any case and is only permitted where not prohibited by law * * *. Congress has always assumed authority to prescribe the conditions under which passports may be issued." Sen. Rep. No. 1358, 81st Cong., 2d Sess., to accompany S. 2311, p. 26. Similarly, Representative Case, a member of the House Committee on Un-American Activities which reported the legislation to the House, said in the course of the debate: "The issuance of passports, the possession of classified information, are the property, you might say, of the Government. So, I personally feel that the committee is on sound ground in presenting a bill which proposes to deny these persons who are members of these organizations these benefits which are either created or conferred by the Government." 96 Cong. Rec. 13732.

D. Even if the presumption established by section 6 were reasonable, it would be an unconstitutional abuse of governmental power to deny persons the right to travel merely because of a likelihood that they would abuse the right.

Section 6 violates due process even if it is assumed that Congress could reasonably find that every member of a proscribed organization would, when abroad, be likely to engage in unlawful conduct endangering the national security. This is so because the right to travel is a constitutional "liberty," and because no citizen may be deprived of his liberty—at least in peacetime—merely because there are grounds for believing that he will be likely to use it for some unlawful purpose.

Preventive detention—the confinement of persons in anticipation of future misconduct—is a hallmark of tyranny. And this is true whether the confinement is to the limits of a concentration camp²⁶ or the borders of a nation.²⁷ Such practices are repugnant to the concept of the presumption of innocence. Moreover, preventive detention under

²⁶ "[T]hose who had committed some act of treason against the new state, or those who might be proved to have committed such an act, were naturally turned over to the courts. The others, however, of whom one might suspect such acts, but who had not yet committed them were taken into protective custody, and these were the people who were taken to concentration camps." Hermann Goering, quoted by Justice Jackson in *Shaughnessy v. Mezei*, 345 U. S. 206, 225-26, n. 8 (dissenting opinion).

²⁷ "In England, the right to travel freely was sharply contested in the early days of the common law, and was seriously curtailed by statute in the time of Edward III and Richard II; but English subjects eventually triumphed over the claims of the royal prerogative, and the once odious writ of *Ne exeat regnum*, discarded as a weapon of tyranny, evolved into the favorite protection of loyal merchants against absconding debtors." Passports and Freedom of Travel (Note), 41 Geo. L. J. 63, 64. Compare section 6 with the Statute of 3 Charles I, Chap. 2, *id.*, p. 69, which prohibited " * * * the passing and sending of any to be popishly bred beyond the seas."

section 6 is imposed without trial by jury, or a judicial or even an administrative finding that the detainee has criminal propensities.

Under our system, even a person charged with the commission of a crime may not be denied freedom of movement for the purpose of preventing him from committing other offenses. Accordingly, bail for an accused and restrictions on his right to travel must be based exclusively on considerations of what is reasonably required to secure his presence and submission to the judgment of the court. *Stack v. Boyle*, 342 U. S. 1, 4; *United States v. Foster*, 79 F. Supp. 422. This principle is applicable not only before conviction, but pending appeal as well. *Stack v. Boyle*, *supra*; *Williamson v. United States*, 184 F. 2d 280; *Reynolds v. United States*, 4 Law Ed. 2d 46. So, in granting bail to the Communist Party leaders after their conviction for conspiring to violate the Smith Act, Justice Jackson said:

"If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand committed." *Williamson v. United States*, *supra*, at 282-83.

For similar reasons the Court narrowly construed a statute giving the Attorney General supervisory power over aliens awaiting deportation. The text of the statute gave the Attorney General broad authority to supervise the activities of such aliens. But consideration of the "liberties that the Constitution safeguards, even for an alien person," led the Court to limit the Attorney General's au-

thority to such controls as are necessary to assure the alien's availability for deportation. *United States v. Witkovich*, 353 U. S. 194, 201; *Barton v. Sentner*, 353 U. S. 963. See also *Siminoff v. Esperdy*, 267 F. 2d 705.²⁸

In what *Kent* characterized (at 128) as "a case of comparable magnitude," the Court sustained the exclusion during World War II of citizens of Japanese ancestry from prescribed West Coast military areas. *Korematsu v. United States*, 323 U. S. 214. The Court justified the exclusion (at 217-18) only because of "the gravest imminent danger to the public safety" from espionage and sabotage in an area threatened by enemy invasion.²⁹

No remotely comparable danger can arise from the peacetime activities of American Communists abroad. Indeed, Congress did not and could not specify the nature of the supposed danger beyond the vague generality of section 2(8) that foreign travel "is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." Presumably, what Congress feared—and all that it could conceivably fear—was that American Communists, when outside the country and beyond surveillance, would be free to conspire among themselves and with foreign Communists to engage in espionage, sabotage or insurrectionary activity of some sort upon their return to the United States. But no such conspiracy could endanger the national security unless followed by overt conduct in this country.

²⁸ In *Witkovich*, the government argued (see pp. 198-99) that a broad interpretation of the statute was required by "the national interest in avoiding recurrence of past Communist activity for which appellee is being deported," and by the finding of section 2(13) of the Act that "numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes * * * are free to roam the country at will without supervision or control."

²⁹ Significantly, no wartime restrictions were placed on the freedom of movement of other potentially disloyal citizens as, for example, members of the German-American Bund.

where it would be subject to detection, prosecution and punishment. And there is not an iota of evidence to indicate that traditional American methods of dealing with crime, under existing criminal laws, are not eminently capable of coping with any such conduct, assuming that it were to be engaged in by American Communists.

No other major Western democracy imprisons Communists within its frontiers. To do so is contrary to the Universal Declaration of Human Rights, art. 13, par. 2, which declares: "Everyone has the right to leave any country, including his own, and to return to his country." And, as one commentator has observed, "It will certainly not help our role as a model to others that, of all the British Commonwealth countries, the Union of South Africa appears to be the first to plan to bring its passport laws into line with United States legislation to control travel abroad." Parker, *The Right to Go Abroad*, 40 Va. L. Rev. 853, 873.

To sustain the practice, unprecedented under our Constitution, of preventive detention in peacetime would have far-reaching consequences to American democracy. If the "menace" of Communism supplies a constitutional justification for the detention within our borders of its American adherents, the same menace warrants prohibiting them from interstate travel,³⁰ placing them under house arrest, or shipping them off to concentration camps.³¹ And if these

³⁰ "If today the threat of Communism justifies confining within our boundaries any citizen who will not swear that he is not a Communist, tomorrow the same logic will justify control of movement from one state to another, for that is no less useful in communication than travel abroad." BAZELON, J., in *Briehl v. Dulles*, 248 F. 2d 561, 584-85 (dissenting opinion, footnote omitted).

³¹ Title II of the Internal Security Act (50 U.S.C. 811-826) provides for the arrest and detention of persons suspected of being security risks in the event of invasion, declaration of war, or insurrection within this country in aid of a foreign enemy. Under the

measures are held not to offend the Constitution when taken against Communists, they will be applied to others who are found to exhibit tendencies regarded as criminal or "dangerous" by the government in power. Thus we would lose our freedom in the name of defeating the schemes of its supposed enemies. For much as some may wish it otherwise, the truth remains that "the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists." Justice Jackson in *Williamson v. United States*, *supra*, at 284.

E. The factual assumptions on which section 6 is predicated cannot justify its application to members of the Communist Party because these assumptions are negated by the findings of the Board in the Party case.

As we have seen, the Congressional justification for section 6 is stated in the recitals of section 2. These are that foreign travel by Communists "is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement" (sec. 2(8)), and that the activities of "the Communist organization in the United States" and the world Communist movement are a clear and present danger to the national security (sec. 2(15)). Both of these legislative findings are belied by the findings which the Board made on the basis of the voluminous evidence adduced in the proceeding which resulted in the registration order against the Communist Party.³² It

original bill, preventive detention was also authorized in case of "imminent invasion" or a Congressional declaration of an "internal security emergency." These provisions were eliminated in the belief that detention was constitutional under the war power only in the event of actual hostilities presenting a clear threat to the national security. See, *The Internal Security Act of 1950* (Note), 51 Col. L. Rev. 606, 651.

³² The Board's findings are contained in its Modified Report on Second Remand of February 9, 1959 (herein called the Report), which appears in the transcript of the record in *Communist Party v. S.A.C.B.*, No. 537, October Term, 1959, pp. 2375-2651. The Report is also an exhibit in the original record filed with this Court in appellant Flynn's case.

follows that, as applied to members of the Communist Party, section 6 violates due process because it deprives them of their liberty for no discernible purpose.

1. The Board found (p. 2644)³³ that the Communist Party was a Communist-action organization as defined by section 3(3) of the Act.³⁴ This ultimate determination was based on the conclusory finding (p. 2644) that the Communist Party "is substantially directed, dominated and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act, and operates primarily to advance the objectives of such world movement." If, as section 2(8) finds, travel from country to country is essential to activities in furtherance of the purposes of the world movement, the Board's conclusory finding would have to be based, in part at least, on subsidiary findings of activities that involve foreign travel. That, however, is not the case.

The Board did not find any significant travel by American Communists to foreign countries after 1936.³⁵ Moreover, the prior instances of foreign travel which it cited were inconsequential. They were mentioned (pp. 2590-2613) in connection with Board findings on the topics of foreign

³³ Page references to the Board's findings are to the record in *Communist Party v. S.A.C.B.*, *supra*, n. 32.

³⁴ Section 3(3) provides: "The term 'Communist-action organization' means * * * any organization * * * which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement. * * *"

³⁵ 1936 was the most recent date on which the Board found (p. 2598) that members of the Communist Party of this country attended Soviet schools. The Report mentioned only four later instances of foreign travel by American Communists. One (p. 2543) was that "a correspondent of the *Daily Worker* is stationed in Moscow." The others concerned travel by appellant Flynn to France and England in 1945, 1949 and 1950 (pp. 2605-06). The Report attached no significance to these visits.

"financial aid," "training," and "reporting" (pp. 2596, 2602, 2613).³⁶ And, as this Court stated, "it does not appear that the Board relied on these three findings to support its ultimate determination." *Communist Party v. S. A. C. B.*, *supra*, at 58.³⁷

Thus the only Board findings of Communist Party activity that had ever involved travel to and from this country were ~~not~~ relied on for the conclusion that the Party operates to further the purposes of the world Communist movement. In contrast, the matters on which the Board did rely for its ultimate determination were unrelated to foreign travel. For example, as the Court stated in the *Party* case (at 59), both the Board and the Court of Appeals "placed significant reliance" on the testimony of Dr. Philip Mosely that over a thirty-year period the announced positions of the Soviet Union and the Communist Party coincided on some forty-five major issues of international policy. As the Court noted (*ibid.*), Dr. Mosely's testimony was based on published documents representative of the respective Soviet and Party views on each issue.

³⁶ Section 13(e) of the Act provides: "In determining whether any organization is a 'Communist-action organization,' the Board shall take into consideration * * * (3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization [which controls the world Communist movement]; and (4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and (5) the extent to which it reports to such foreign government or foreign organization or to its representatives * * *."

³⁷ The Court in the *Party* case (at 57-58) summarized these findings by stating that "the Board found, respectively, that the Communist Party had received financial aid from the Soviet Union and the Comintern and had sent its members to the Soviet Union for training, prior to about 1940, but that there was no evidence that these activities continued after that time, and that the Communist Party 'upon occasion' reports to the Soviet Union."

There was no suggestion in his testimony³⁸ or in the Board's findings (pp. 2580-90) that the identity of views was the result of or had anything to do with foreign travel. On the contrary, the thirty-year period covered by the Mosely testimony did not end until 1951 (Report, p. 2581, n. 92), fifteen years after the last instance of significant foreign travel found by the Board.

Another finding on which the Board relied heavily to support its ultimate determination was (p. 2522) "that in 1944 [the Communist Party] modified its line in conformance with the then line of the Soviet Union as understood by [the Party's] leader Earl Browder; and that in 1945 [the Party] reverted to 'its basic Communist principles' (*supra*) and reemphasized Marxism-Leninism upon the issuance of a statement to the effect that it should do so by a leading foreign spokesman of the world Communist movement." The reference is to the 1944 dissolution of the Communist Party and formation of the Communist Political Association, followed by the reconstitution of the Party a year later. Neither episode involved foreign travel. The Board found (p. 2517) that the 1944 action was inspired by the public announcement of the dissolution of the Communist International the previous year, and (p. 2518) that the reconstitution of the Party was prompted by an article of the French Communist, Duclos, published in a French journal.

These examples could be multiplied, but enough has been said to demonstrate that foreign travel by American Communists played no part in the determination of the Board that the Communist Party serves as the agent of the world Communist movement to further the objectives of the latter in this country. The Board's determination,

³⁸ As the Court stated in the *Party* case (at 64), "Dr. Mosely did not purport on direct examination to establish the thought processes or the political processes by which the Soviet and the Party arrived at their positions, but only that the positions were identical."

therefore, negates the section 2(8) finding that foreign travel "is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement", at least as applied to members of the Communist Party.

2. The findings of the Board concerning the Communist Party likewise contradict the finding of section 2(15) that "the Communist organization in the United States . . . and the nature and control of the world Communist movement" present a danger to the national security. This conclusory finding is based on the findings of section 2(2) and (6) that it is the purpose of the world Communist movement and the action organizations which it establishes in various countries, through the use of espionage, sabotage, terrorism, force, "and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world."

The ultimate objective which section 2 attributes to the world Communist movement is not of itself a "danger" which can provide the constitutional justification for section 6. For however obnoxious a "Communist totalitarian dictatorship" as defined by the Act may be, it is not an evil which Congress has power to prevent so long as the means employed to achieve it are peaceable. "If in the long run, the beliefs established in totalitarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their day." Holmes, J., dissenting in *Gitlow v. New York*, 268 U. S. 652, 673. Moreover, as we have noted (*supra*, p. 19), section 4(a) of the Act recognizes that this is so.

Hence the constitutional justification for section 6 must rest on the findings of section 2(2) and (6) that Communist action organizations of various countries attempt to secure their ultimate objective by forcible or other unlawful means. As the Report of the Board demonstrates, however, there

is no factual basis for this finding in the activities of the Communist Party.

The Report (p. 2644) found that it is the objective of the Communist Party "to install a Soviet style dictatorship in the United States." But there is no finding that the Party has ever used unlawful means to attain this objective. The Report did not find that the Party engages in espionage, sabotage, terrorism, force or violence, or that it is preparing or conspiring to do so. Nor was it found that the Party incites force or violence. At most, the Report (p. 2635) found Party advocacy of forcible overthrow as a matter of abstract doctrine, and the Court so viewed the findings. *Communist Party v. S. A. C. B.*, *supra*, at 56 (majority opinion) and 130-33 (dissent of the Chief Justice).

Advocacy of forcible overthrow as a matter of doctrine, without incitement to action, is constitutionally protected and may not be punished. *Yates v. United States*, 354 U. S. 298; *Noto v. United States*, 367 U. S. 290.³⁹ Accordingly, the Board findings are as bare of unlawful advocacy as they are of unlawful acts. The fact is that the Communist Party was found to be a Communist-action organization on no more substantial grounds than that, in the words of the Court of Appeals, it has an "intellectual affiliation to a cause," the cause of Communism. *Communist Party v. S. A. C. B.*, 277 F. 2d 78, 83. This intellectual affiliation has nothing to do with insurrectionary conspiracies or foreign travel.

The majority in the *Party* case held (at 56) that a finding by the Board that the Communist Party was engaged in unlawful acts or advocacy was not a prerequisite to an

³⁹ It was the inability of the government to meet the standard of proof of unlawful advocacy laid down in these cases that led to the dismissal of the then pending Smith Act indictments against Communists. See, *supra*, p. 18.

order that it register under the Act.⁴⁰ This holding was based on the view that insofar as the registration requirement is concerned the Act "is a regulatory, not a prohibitory statute." However that may be with respect to the disclosure provisions of the Act, it is plainly not true of section 6 which prohibits persons from travelling abroad and punishes them for even applying for passports.

Because section 6 is a "prohibitory statute" its application to members of an organization found to be a Communist-action organization must be conditional upon Board findings which match the findings of section 2(2) and (6) that the organization has engaged in, conspired to commit, or incited unlawful conduct.⁴¹ Since the Board made no such findings concerning the Communist Party, section 6 may not constitutionally be applied to Party members.

II. On its face and as applied, section 6 violates the First Amendment.

On its face and as applied, section 6 restrains speech, press and assembly in a variety of ways.

First, the avowed purpose of section 6, as stated in section 2(8), is to prevent the "communication" among Communists which their travel from country to country makes possible. In this aspect, section 6 places a direct restraint on the speech of American Communists, and on their association with the Communists of other countries.

Second, section 6, as applied, prevents appellants from accomplishing their purposes of travelling abroad to ob-

⁴⁰ But see the dissent of the Chief Justice (at 130-33).

⁴¹ Cf. the observation of Judge Wyzanski in *Freedom to Travel*, Atlantic Monthly, Oct., 1952, p. 68: "The physical contact between men of different nationalities while they exchange ideas, no matter how unconventional, is no evidence of a clear and present danger unless the ideas themselves include a punishable incitement to immediate action."

serve conditions, listen to others, and form opinions on the basis of what they see and hear (R. 9-10, 24). The situation is as if appellants were prohibited from attending lectures or reading books. They are being denied the First Amendment "right to hear." *United States v. C.I.O.*, 335 U. S. 106, 144 (concurring opinion).

It is apparent that section 6 denies a similar opportunity to virtually all those for whom it prohibits foreign travel. "This travel [abroad, to exchange ideas and experiences] does not differ from any other exercise of the manifold freedoms of expression—from the right to speak, to write, to use the mails, to publish, to assemble; to petition. In all these liberties, the principal element is the stretching of the mind to accommodate the growing spirit. * * * Is not freedom to carry on such intercourse the core of our creed? For we cherish this liberty of communication not only for the sake of the traveller and his ideas, but more especially for the growth of the rest of us and our adventurous society." Wyzanski, *Freedom to Travel*, *supra*, at p. 68. In this aspect also, section 6 is a direct restraint on expression and association.

Third, both appellants are writers and public speakers who desire to lecture in Europe and to gather material there for writing and lecturing upon their return (R. 8-10, 23-24). For them, as for a newspaperman, the "right to travel is a part of the freedom of the press." *Worthy v. Herter*, 270 F. 2d 905, 908. Section 6 therefore directly restrains appellants' right to address American audiences and the right of the audiences to hear them.

Finally, because the prohibition of section 6 is predicated on membership in an organization, it is a discouragement of association. Association in an organization engaged in advocacy is within the protection of the First Amendment. Accordingly, governmental measures inhibiting such association, even if only indirectly, are subject to First

Amendment limitations. *Gibson v. Florida*, 372 U. S. 539, 543-44; *N. A. A. C. P. v. Alabama*, 357 U. S. 449; *Bates v. Little Rock*, 361 U. S. 516; *Communist Party v. S. A. C. B.*, *supra*, at 90-91; *American Communications Association v. Douds*, 339 U. S. 382, 402.

In the three respects in which section 6 directly restrains speech, press and association, it also acts as a prior restraint on the exercise of these rights. The section therefore "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 272 U. S. 58, 70.

A. The restraints imposed by section 6 on persons found to be members of the Communist Party are far broader than required to meet any evil that Congress has power to prevent.

Due process limitations allow the legislature a wide latitude in selecting the means for accomplishing a governmental purpose. *United States v. Carolene Products Co.*, 304 U. S. 144, 151. Because section 6 restrains expression and association, it must satisfy a more demanding standard. In the area protected by the First Amendment, considerations of administrative convenience and efficient enforcement yield to the social interest in the freedoms that the Amendment protects. Hence, legislation in this area is invalid unless the restraint is no broader than the abuse to which it is directed. *Shelton v. Tucker*, 364 U. S. 479, 488-89.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N. A. A. C. P. v. Button*, 371 U. S. 415, 433. "Broad prophylactic rules in the area of free expression are suspect. * * * Precision of regulation must be the touchstone in an area so closely touching our

most precious freedoms." *Id.* at 438. As stated in *Skelton v. Tucker, supra*, at 488 (footnotes omitted):

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

For these reasons, legislation punishing a bookseller for the bare possession of an obscene book cannot be sustained on the ground that a narrowly drawn law requiring proof of scienter would be susceptible of easy evasion. *Smith v. California*, 361 U. S. 147. The state may not "burn the house to roast the pig" by proscribing the sale of books to all because they tend to corrupt the morals of children. *Butler v. Michigan*, 352 U. S. 380, 383. It may not prohibit the distribution of anonymous leaflets the better to control fraud, false advertising and libel. *Talley v. California*, 362 U. S. 60. Nor will the state's interest in preventing barratry sustain a statute which prevents the solicitation and subsidization of litigation as part of an activity which the Amendment protects. *N. A. A. C. P. v. Button, supra*.

The principle of these cases was applied in *De Jonge v. Oregon*, 299 U. S. 353, which held that the assumption that the Communist Party advocates forcible overthrow cannot justify a statute proscribing participation in its meetings for peaceable political action. It was applied again in *Scales v. United States*, 367 U. S. 203, which sustained the membership clause of the Smith Act only because the Court believed that, as construed, it was narrowly tailored to fit unprotected association and expression. Thus the Court stated (at 229):

... the membership clause, as here construed, does not cut deeper into the freedom of association

than is necessary to deal with 'the substantive evil that Congress has a right to prevent.' *Schenck v. United States*, 249 U. S. 47, 52. The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' *Noté v. United States*, *post*, p. 290. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute * * *. (Bracketed matter in the original.)

Section 6 obviously runs afoul of the rule of the foregoing decisions. In the name of preventing some Communists from travelling abroad for conspiratorial purposes, it bars all Communists from travelling abroad for the purpose of learning and communicating their observations to others. Since section 6 applies irrespective of the absence of guilty intent and knowledge, and even of organizational activity, it reaches "the members for whom the organization is a vehicle for the advancement of legitimate aims and policies" (*Scales* at 229). Again, the restraints of the section are imposed on persons because of their association with an organization which has *not* "been shown to have engaged in illegal advocacy" or conduct (*ibid.*; see *supra*, p. 36). For all these reasons, section 6 does "cut deeper into the freedom of association [and expression] than is necessary to deal with 'the substantive evils that Congress has a right to prevent'" (*ibid.*).

This vice of section 6 is aggravated by the fact that the section imposes a prior restraint on expression and association. The Court has summarized the classic decision on this subject in *Near v. Minnesota*, 283 U. S. 697, as follows:

"Minnesota empowered its courts to enjoin the dissemination of future issues of a publication be-

cause its past issues had been found offensive* * *. This was enough to condemn the statute." *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 445.⁴²

Section 6 goes further. It imposes a prior restraint on the exercise of First Amendment rights by persons who have never abused them and who know of no such abuse by the organization of which they are found to be members.

The prior restraint of section 6 is more repressive than the licensing systems condemned in *Loyell v. Griffin*, 303 U. S. 444; *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Niemotko v. Maryland*, 340 U. S. 268; *Kunz v. New York*, 340 U. S. 290; and cf. *Staub v. Barley*, 355 U. S. 313. These cases invalidated legislation which vested an official with uncontrolled discretion to license the use of the streets and thereby empowered him to prohibit their use for protected purposes. Section 6 goes to the other extreme. It denies the Secretary any discretion and casts its prohibition in terms that are at once so inclusive and so rigid as necessarily to encompass travel for protected purposes.

Section 6 also violates the rule of *Speiser v. Randall*, 357 U. S. 513, that in proceedings to enforce a statute which inhibits the exercise of First Amendment rights, the state is constitutionally required to bear the burden of proving facts justifying the application of the inhibition to the individual in question. The statute in that case was invalidated because it cast the burden of proof on the individual. Section 6 goes further. It dispenses with such proof altogether. Instead, it establishes a conclusive presumption of unfitness to travel which arises from nothing but an association which may be entirely innocent. As stated in *Speiser*, at 529, the government "clearly has no such com-

⁴² See also, *Donaldson v. Read Magazine*, 333 U. S. 178; *Milwaukee Publ. Co. v. Burleson*, 255 U. S. 407, 421 (dissenting opinion).

elling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech."

B. Section 6 imposes other invalid restraints on the exercise of First Amendment rights.

The restraints of section 6 are not confined to persons found to be members of the Communist Party. They prevent the free exercise of expression and association by a far wider body of citizens. None of the latter is today before the Court. But "the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution." *Smith v. California*, 361 U. S. 147, 151, and authorities there cited. Accordingly, it is pertinent to consider the impact of section 6 upon persons other than those in appellants' position.

1. Section 6 denies passports to all members of organizations which have been finally ordered to register as Communist-fronts. The Act's definition of fronts (sec. 3(4)) reaches organizations having a membership preponderantly composed of non-Communists. See sec. 2(7).⁴³ Such persons are not among the "Communist members, representatives, and agents" referred to in the justification which section 2(8) advances for section 6. And the Act

⁴³ " * * * the theory of the statute respecting Communist fronts is that the Communists disguise their true objectives and foster organizations with declared objectives which are attractive. The statute recites that this practice draws support from persons who would not lend such support if they were aware of the true situation. Thus, almost by definition, many members of a Communist front are unsympathetic to Communist aims or Communist philosophy." *National Council of American-Soviet Friendship v. S.A.C.B.*, 322 F. 2d 375, 379.

does not and could not advance any legitimate reason for denying them the right to travel. Yet section 6 punishes them if they even apply for passports.⁴⁴

2. By reason of section 6 and the final registration order against the Communist Party, the right to travel is denied not only to persons who are members of that organization within the conventional meaning of "member," but also to all those who may be found to be members under the vague and expansive indicia of membership set forth in section 5 of the Communist Control Act, 50 U. S. C. 844, and in *Killian v. United States*, 368 U. S. 231. Section 5 and *Killian* make the "membership" of an individual depend on such considerations as whether he ever attended any type of gathering of the Communist Party; ever conferred with other "members" "in behalf of any plan or enterprise" of the organization; ever "advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members" of the organization, or to anyone else in its behalf; ever indicated in any way a willingness to carry out in any manner and to any degree the plans, objectives or designs of the organization, or ever participated in any other way in its activities or planning. Under these indicia of "membership," almost anyone may be denied the right to travel on the ground that he is a member of the Communist Party.

3. Section 6(b) requires the Passport Office and the Secretary, under pain of criminal penalties, to withhold a passport from any person who they have "reason to believe" is a member of a Communist-action organization. Accordingly, they must in self-protection refuse passports

⁴⁴ On December 17, 1963, the Court of Appeals for the District of Columbia affirmed Board orders requiring four organizations to register as Communist-front organizations. *American Committee for Protection of Foreign Born v. S.A.C.B.*; *Veterans of the Abraham Lincoln Brigade v. S.A.C.B.*; *Jefferson School of Social Science v. S.A.C.B.*; *Weinstock v. S.A.C.B.* (affirming order against United May Day Committee); none yet reported.

on evidence less than that which would support a finding of membership.⁴⁵ By the same token, this provision operates to deter persons from associating with proscribed organizations in ways short of membership.

4. Section 6 inevitably inhibits any person who is unwilling to jeopardize his travel rights from associating with any organization against which registration proceedings are pending, threatened or thought likely.

5. By denying members of proscribed organizations and others the opportunity to acquire information and ideas abroad, section 6 denies the First Amendment rights of their potential listeners and readers by curtailing the latter's access to such knowledge.

The restraints of section 6 on freedom of expression and association are intensified by the fact that the standards for determining whether an organization is an action or front organization focus on views and policies and their expression. See secs. 13(e) and (f) and *Communist Party v. S.A.C.B.*, *supra*, at 58-59. This is also true of the indicia of membership in the Communist Party contained in section 5 of the Communist Control Act. Presumably, similar indicia will be applied by the Secretary in determining whether a passport applicant is a "member" of a given front organization. The consequences on the First Amendment rights of all citizens was described by President Tru-

⁴⁵ Thus, although section 6 applies only to persons who are members of proscribed organizations at the time they apply for or use passports, the Department's official passport application form (DSP-11) requires applicants to certify (emphasis supplied): "I am not and have not been at any time during the period of 12 full calendar months preceding the date of this application * * * a member of any organization registered or required to register as a Communist organization under Section 7 of the Subversive Activities Control Act of 1950, as amended."

man when he vetoed the Act (H. R. Doc. No. 708, 81st Cong., 2d Sess., p. 5):

"And what kind of effect would these provisions have on the normal expression of political views? Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

Section 6 thus imposes severe and indiscriminate restraints on the First Amendment freedoms of many American citizens, Communist and non-Communist. These restrictions serve no public interest. They have their source in nothing more substantial than the unreasoned fears which the stresses of the cold war have engendered. Neither the clear and present danger test nor the balancing test can reconcile section 6 with the first Amendment.

C. *American Communications Association v. Douds*, if correctly decided, is inapplicable.

The opinion of the District Court (R. 50, 52-53) leaned on *American Communications Association v. Douds*, 339 U. S. 382. That case sustained the constitutionality of section 9(h) of the Taft-Hartley Law, requiring trade union officers to execute non-Communist affidavits as a condition of their union's access to the facilities of the National Labor Relations Board. *Douds* held that section 9(h) did not violate the First Amendment because its limited "discouragement" of the exercise of protected political rights was outweighed in the constitutional balance by the interest of the government in protecting interstate commerce from the threat of political strikes, which Congress found were fomented by Communists in positions of trade union leadership.

We believe that the decision in *Douds* was wrong. In any event, it is inapplicable for a number of reasons.

First, *Douds* found (at 396, 399) that section 9(h) had only a tangential effect on First Amendment rights. Section 6, as we have shown, is a direct restraint upon their exercise. Accordingly, the distinction observed in *Speiser v. Randall*, *supra*, at 527, between section 9(h) and the statute there invalidated is applicable to section 6.

Second, section 9(h) did not prohibit a member of the Communist Party from holding trade union office but subjected him only to possible loss of position (*Douds* at 390). Furthermore, "the loss of a particular position is not the loss of * * * liberty" (*id.* at 409). Section 6, in contrast, prohibits members of proscribed organizations from traveling abroad (or even from applying for permission to do so), and thereby denies them liberty in the constitutional sense: *Kent v. Dulles*, *supra*, at 125.

Third, the "discouragements" of section 9(h) did not apply to all members of the Communist Party, but were directed "only against the combination of those affiliations * * * with occupancy of a position of great power over the economy of the country" (*Douds* at 403-04).⁴⁶ Section 6, on the other hand, applies to all members of proscribed organizations merely by virtue of their membership, and thus denies travel rights to persons who are powerless to injure the economy or security of the country, even given the unwarranted assumption that they have the desire or propensity to do so.

Fourth, section 6, unlike 9(h), does not touch "only a relative handful of persons, leaving the great majority of

⁴⁶ As stated by Justice Jackson, "Also, the [Taft Hartley] Act does not require or forbid anything whatever to any person merely because he is a member of, or is affiliated with the Communist Party. It applies only to one who becomes an officer of a labor union." *Douds* at 434 (concurring opinion).

persons of the identified affiliations * * * free from restraints" (*Douds* at 404). On the contrary, section 6 restrains all members of proscribed organizations, and its "discouragements" affect many others who are not members. Unlike 9(h), therefore, it *does* involve "the elements of censorship" and "prohibition of the dissemination of information" (*id.* at 403).

Finally, *Douds* (at 387-89) found no reason to question the Congressional findings, with respect to the activities of Communists in positions of trade union leadership, which supplied the legislative justification for section 9(h). Here we have shown that the findings which Congress made to justify section 6 are negated as to the Communist Party by the Board's findings in the registration proceedings. Moreover, the Congressional findings, on their face, do not support the denial of passports to non-Communist members of front organizations. See *supra*, pp. 32-37, 43-44.

In short, none of the grounds advanced in *Douds* to sustain section 9(h) is applicable to the present case.

III. Section 6 violates procedural due process and is a bill of attainder because it makes the 1953 finding of the Board that the Communist Party was a Communist-action organization conclusive upon appellants as to the present character of the Party.

The Secretary introduced no evidence in the administrative proceeding to prove, and made no finding, that the Communist Party is a Communist-action organization within the Act's definition of that term. Instead, he sustained the revocation of appellants' passports in reliance upon the final order of the Board requiring the Party to register as a Communist-action organization. The Board issued this order in 1953 on the basis of hearings that were closed in 1952 except for issues going to the credibility of wit-

nesses previously heard. *Communist Party v. S. A. C. B.*, *supra*, at 19-22.

In 1962, therefore, appellants were denied the right to travel because of a determination as to the character of the Communist Party made ten years earlier in a proceeding to which they were not parties. This procedure is undoubtedly required by section 6(b) of the Act, which makes it unlawful for an officer of the United States to issue a passport to a person who he has reason to believe is a member of an organization as to which "there is in effect a final order of the Board" requiring registration as a Communist-action organization. In this respect, however, section 6(b) violates the due process principle that persons may not be deprived of liberty or property without a hearing at which they may contest the factual premises on which the validity of the deprivation depends. *Noto v. United States*, 367 U. S. 290, 299; *Renaud v. Abbott*, 116 U. S. 277, 288. Cf. *Kirby v. United States*, 174 U. S. 47.

The authors of the Act recognized that this due process requirement was applicable to criminal prosecutions under section 6(a). For 6(a) requires the government to prove not only, as under 6(b), that the organization of which the accused is a member has registered or been ordered to register as a Communist organization, but also that it is "a Communist organization as defined in paragraph (5) of section 3."⁴⁷ Due process similarly requires a hearing on the character of the organization in civil proceedings for the denial of passports under section 6(b).

In the present case, the claim that the Secretary's action is constitutional depends on the correctness of the premise that the Communist Party was a Communist-action organization at the time his action was taken. Hence even if it

⁴⁷ Section 5(a) (50 U.S.C. 784(a)) requires similar proof of the character of the organization in a prosecution for applying for or holding a forbidden job.

could be said that appellants, having been found to be members of the Communist Party, are bound by the Board's 1953 determination, they would still be entitled to a hearing on the present character of the organization. At a minimum, due process required that petitioners be given an opportunity to prove that the Board's 1953 finding is no longer tenable. Nothing is more arbitrary in this changing world than a conclusive presumption that a condition, once found, will continue to exist in perpetuity. It is therefore a principle of due process that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U. S. 144, 153; *Chaistleton Corporation v. Sinclair*, 264 U. S. 543; *Baker v. Carr*, 369 U. S. 186, 214. The rule of these cases is of particular significance here. For, as the Chief Justice observed in dissenting in the *Party* case (at 134, n. 11), even the Board's 1953 finding was based on a presumption of continuity which "is certainly dubious," applied to "stale evidence" of Party activities prior to 1940.⁴⁸

The court below dismissed this branch of our argument with the statement (R. 48), "There has been no evidence offered or adduced, that the 'leopard' of the world Communist movement has changed a single spot in the past thirteen years nor would common sense nor common knowledge indicate any such change." But section 6(b) does not permit evidence to be adduced of a change in the world Communist movement or in the character of the Communist Party. And the issue may not be resolved by "common knowledge."⁴⁹ *Ohio Bell Telephone Co. v. P. U. C.*, 301

⁴⁸ The majority (at 69) refused to pass on the sufficiency of this evidence.

⁴⁹ In fact, it is now "common knowledge" that the concept expressed in section 2 of the Act that the world Communist movement is a monolithic organization under the iron control of Moscow is a myth.

U. S. 292, 301-02; *Chastleton Corporation v. Sinclair, supra*. It is precisely for these reasons that section 6(b) violates procedural due process.

The court below also based its holding that the Board's 1953 determination was binding on petitioners on what it thought was the failure of the Communist Party "to utilize the procedures under section 13(b)" for a redetermination of its status (R. 48). The procedure referred to is not available to the Party, however. Section 13(b) and (i) permits an organization which has registered as a Communist organization to make annual application to the Board for cancellation of its registration on a showing that it no longer has the characteristics which had been attributed to it by the Board. This provision, however, applies only to registered organizations. No provision of the Act permits an unregistered organization or its members to secure a redetermination of the organization's status.

The Communist Party did not register but has litigated the requirement that it do so, raising the constitutional questions which were held premature in the *Party* case (at 106-07). The Court of Appeals recently reversed the Party's conviction for failure to register. *Communist Party v. United States*, No. 17583, C. A. D. C., Dec. 17, 1963, not yet reported. If this decision stands and the Party refrains from registering in reliance upon it, members of the Party can never escape the effect of the Board's 1953 determination.

The majority in the *Party* case relied on section 13(b) and (i) in holding that the Act is not a bill of attainder. Citing these provisions, the Court said (at 87): "Far from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuously contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of the de-

scribed character." This observation is plainly not true of the application of section 6 to appellants, which *does* turn on "the past and ineradicable actions" of the Communist Party. For that reason, section 6, as applied, not only violates due process but is a bill of attainder.

CONCLUSION

The judgment below should be reversed

Respectfully submitted,

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APPENDIX—STATUTE INVOLVED

The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781, *et seq.*, as amended, provides in part as follows:

NECESSITY FOR LEGISLATION

SEC. 2. [781]* As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

* Numbers in brackets are the section numbers of 50 U.S.C.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts," which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts."

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objec-

tives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication

that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

DEFINITIONS

SEC. 3. [782] For the purposes of this title—

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

**DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST
ORGANIZATIONS**

SEC. 6. [785] (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for

any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

REGISTRATION AND ANNUAL REPORTS OF COMMUNIST ORGANIZATIONS

SEC. 7. [786] (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

REGISTRATION PROCEEDINGS BEFORE BOARD

SEC. 13. [792] • • •

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the

annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief, may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title • • •

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organiza-

tion, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual reports; and send a copy of such order to such organization; • • •

(k) When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

JUDICIAL REVIEW

SEC. 14. [793] • • •

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A, shall become final—

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. [794] (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000. Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

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Supreme Court of the United States

October Term, 1963

No. 461

HEBBERT APTHEKER, ET AL.,

Appellants,

against

THE SECRETARY OF STATE.

**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION
AS AMICUS CURIAE**

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

The American Civil Liberties Union is filing this brief, with the consent of the parties, because it believes that this case presents important issues affecting freedom of association and the right to travel.

Appellants question the constitutionality of that portion of the Subversive Activities Control Act which prohibits the issuance of a passport to any member of a Communist organization which has been required to register and even makes it an offense for any such member to use an existing passport or ask for its renewal or the issuance of a new one (50 U. S. C. § 785).

Appellants having exhausted all the administrative procedures set up by the State Department then sued for declaratory judgment. The three judge court ruled against them on the ground that they were shown to be Communists and that Congress had, in 1950, found that travel of Party members was one of the methods used for the furtherance of the Party's revolutionary objectives.

This Court has recognized that the right to travel is part of the liberty protected by the due process clause

(*Kent v. Dulles*, 357 U. S. 116, 125). Infringement of such a basic right is permissible only upon a showing of necessity and may be restricted only by a statute narrowly drawn to meet the need (*Winters v. New York*, 333 U. S. 507; *Smith v. California*, 361 U. S. 147; *Scales v. United States*, 367 U. S. 263; *NAACP v. Button*, 371 U. S. 415).

It needs no elaborate analysis to establish that the statute here under attack is not such a narrowly restricted one. For it sweeps within its wide prohibition every person who, after the order for registration has become final; remains a member of the organization and knows of the existence of the order. There is no requirement of active association with the organization; no limitation on travel to sensitive areas. In effect the statute has created an irrebuttable presumption that every Communist who travels to a country which requires a passport will there engage in some activity dangerous to the security of the United States. (It may be noted in passing that the statute cannot possibly accomplish its supposed objective since there are many countries to which even a Communist may travel without any passport from the United States.)

The scope of the statute, of course, covers much more than just the Communist Party. Its penalties apply to members of both Communist action and Communist front organizations (see 50 U. S. C. § 782 subd. 5). The Subversive Activities Control Board has required a large number of "front" organizations to register and has been sustained by the Court of Appeals for the District of Columbia in a number of instances. If this Court should let those decisions stand the scope of this statute will be immeasurably widened.

In our view, an important aspect of a statute such as this is not only its immediate impact on appellants or others who may be denied passports, but on its indirect impact on freedom of association. We are all aware of the timidity engendered by the excesses of the McCarthy era,

particularly of the pall which fell upon the student body of the country. Young people were made aware of the serious consequences which flowed from associations their elders had made when they were students and were frightened into a conformity harmful to the development of that spirit of independence which has made this country great. Recent developments in the South have stirred the conscience of the young so that there is reason to believe that we are emerging out of the fear which so long prevailed. But there can be no gainsaying that the existence of a statute such as this will contribute to a prolongation of the era of fear and discourage free association.

We should note in passing that the statute impinges on due process because it makes binding on all individuals affected the determination of the character of the organization made in a proceeding to which they were not parties. (See *United States v. Spector*, 343 U. S. 169, Jackson and Frankfurter dissenting at 176ff; Cf. Fraenkel. Can the Administrative Process Evade the Sixth Amendment, 1 Syracuse L. Rev. 173.)

For all these reasons we respectfully submit the statute should be declared unconstitutional.

Respectfully submitted,

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19

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 461

**HERBERT APTHEKER AND ELIZABETH GURLEY FLYNN,
APPELLANTS**

v.

THE SECRETARY OF STATE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the district court (R. 42-54) is reported at 219 F. Supp. 709.

JURISDICTION

The judgment of the district court was entered on August 2, 1963. Each appellant filed a notice of appeal to this Court on the district court on August 9, 1963 (R. 55, 56), and this Court noted probable jurisdiction on December 2, 1963 (R. 57; 375 U.S. 928). The jurisdiction of this Court rests upon 28 U.S.C. 1253.

(1)

QUESTION PRESENTED

Whether Section 6 of the Subversive Activities Control Act is unconstitutional on its face or as applied.

STATUTE AND REGULATION INVOLVED

The relevant provisions of the Subversive Activities Control Act of 1950, as amended, 50 U.S.C. 781, *et seq.* are set forth in the Appendix to appellants' brief, pp. 53-57.¹ The Department of State's Passport Regulations, 22 C.F.R. 51.135-51.170, are set forth in Appendix A to this brief, pp. 73-80.

STATEMENT

The order of the Subversive Activities Control Board, directing the Communist Party of the United States of America to register with the Attorney General as a "Communist-action organization" under the Subversive Activities Control Act, became final on October 21, 1961, ten days after the issuance of this Court's mandate in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, in which the Board's order had been upheld. See 50 U.S.C. 793 (b)(4). When the Board's order became final, Section 6 of the Act, 50 U.S.C. 785, became effective as to current members of the Communist Party.

Section 6 provides that, when an organization registers or is required to register by a final order of the Subversive Activities Control Board, it is unlawful for

¹ The entire Act is described in detail in the government's brief in *Communist Party v. Subversive Activities Control Board*, No. 12, Oct. Term 1960, pp. 65-84.

any member of the organization, with knowledge or notice that the order has become final, to apply for, use, or attempt to use a United States passport. Section 6 also makes it unlawful for any officer or employee of the United States to issue a passport to any person who he knows or has reason to believe is a member of such an organization.

1. *Administrative Proceedings.*—On October 21, 1961, both appellants possessed valid United States passports (R. 11-27). The Secretary of State revoked the passports on the ground that their use would violate Section 6 of the Act. The administrative procedures relating to these revocations are substantially identical. To avoid repetition, we will describe only the specific facts relating to Mrs. Flynn.

Mrs. Flynn was notified by a letter dated January 22, 1962, from the Acting Director of the Passport Office of the Department of State that her United States passport had been revoked (R. 39). The stated ground for this action was that the Department of State believed that her use of the passport would violate Section 6. She was also advised that she could seek a review of the action under the Department's regulations. 22 C.F.R. 51.135-51.170.

In accordance with these regulations, Mrs. Flynn requested and received a review of the revocation of her passport. A hearing was held before a duly appointed hearing officer, at which she was represented by counsel. The Department of State introduced oral testimony and documentary evidence showing that Mrs. Flynn had been a member of the Communist

Party since 1937, a member of the Party's National Committee since 1938, and was currently Chairman of the Party (Ex. 101, pp. A17-20, A32).² Mrs. Flynn offered no evidence. As required by the regulations, all witnesses at the hearing were subject to confrontation and cross-examination, and the hearing officer's findings were in no part based on confidential security information not made available to Mrs. Flynn. 22 C.F.R. 51.138(b).

The hearing officer concluded on June 18, 1962, that "the evidence adduced at the hearing clearly establishes that at all times material in this proceeding, petitioner was an active, participating and continuous member of the Communist Party of the United States" (Ex. 103, p. 5) and recommended that the decision revoking Mrs. Flynn's passport be sustained (Ex. 103, p. 6). On July 17, 1962, the Director of the Passport Office notified Mrs. Flynn that she had studied the record of the hearing and had concluded that the revocation was lawful and that no change, correction, or modification was warranted (R. 27-28).

Mrs. Flynn appealed to the Board of Passport Appeals. The Board, after full examination of the record and after hearing arguments by counsel, found that "at all material times [Mrs. Flynn] was a member of the Communist Party of the United States

² In a similar hearing, appellant Aptheker was shown to have been a member of the Communist Party since 1939 and to be currently the editor of Political Affairs, which describes itself as the "theoretical organ of the Communist Party" (Ex. 202, pp. A37, A40).

with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act" (R. 29-31, 39). The Board recommended, on the basis of the evidence in the record, that the decision of the Passport Office to revoke Mrs. Flynn's passport should be affirmed (R. 29-30).

The Secretary of State on October 18, 1962, approved the recommendation of the Board of Passport Appeals and specifically adopted as his own its finding of Mrs. Flynn's Communist Party membership "with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act" (R. 29-30, 39). In so doing, the Secretary relied solely on the evidence in the record (R. 30).

2. *Proceedings in the District Court.*—Appellants brought separate suits in the United States District Court for the District of Columbia seeking (a) that Section 6 of the Act be declared unconstitutional; (b) that the Secretary of State be enjoined from continuing his revocation of their passports and from refusing either to renew their passports or issue new ones; and (c) that the Secretary be required to re-issue passports to them (R. 4, 19). The suits were consolidated on April 29, 1963. At that time, the expiration dates of the passports of both appellants had passed: Mrs. Flynn's on March 9, 1963, and Mr. Aptheker's on December 9, 1962 (R. 40, 42). All parties agreed, however, that it would have been futile for either appellant to have applied for a passport or a

renewal while a member of the Communist Party of the United States; such an application would, in fact, have been unlawful under Section 6 (R. 21). The parties stipulated, therefore, that all administrative remedies had been exhausted (R. 44).

The appellants agreed that for the purposes of the present cases, the Secretary of State had an adequate basis for finding that they were members of the Communist Party of the United States and, therefore, for revoking their passports if Section 6 is constitutional (R. 44). The only issue in the proceeding below was thus the constitutionality of Section 6. Appellants alleged that Section 6 is unconstitutional as: (a) a deprivation without due process of law of their constitutional liberty to travel abroad, in violation of the Fifth Amendment; (b) an abridgement of their freedom of speech, press, and assembly, in violation of the First Amendment; (c) a bill of attainder, in violation of Article 1, sec. 9, cl. 3; (d) a deprivation of their right to trial by jury, as guaranteed by the Fifth and Sixth Amendments and Article III, section 2, clause 3; and (e) a cruel and unusual punishment, in violation of the Eighth Amendment.

The court below unanimously rejected appellants' contentions and granted the motion of the Secretary of State for summary judgment. The court concluded that Section 6 "is a valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regulatory scheme bears a reasonable relation thereto" (R. 50).

7

ARGUMENT

INTRODUCTION AND SUMMARY

The Secretary of State, pursuant to Section 6 of the Subversive Activities Control Act of 1950, revoked appellants' passports and refused to renew them or issue new ones because appellants were members of the Communist Party. That section forbids members of Communist-action organizations which have registered or been required to register by order of the Subversive Activities Control Board to apply for or use passports and forbids government officials to issue such passports.³ The Board had found that the Communist Party was a Communist-action organization required to register under the Act, and the determination had been upheld by this Court. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1. Since it is a crime for an American citizen to travel outside the Western Hemisphere or to Cuba without a passport (8 U.S.C. 1185(b)), the effect of Section 6 is to prevent travel by members of the Communist Party to most foreign countries.

Appellants do not challenge the adequacy of the administrative procedures which resulted in the revocation of their passports. Each was given a hearing with the right to confront and cross-examine witnesses, the "traditional safeguards of due process."

³ Section 6 also forbids members of Communist-front organizations which have registered or been ordered to register to apply for or use passports. Since appellants were found by the Secretary of State to be members of a Communist-action organization, the issue as to Communist-front organizations is not before the Court.

Greene v. McElroy, 360 U.S. 474, 506-507. The Passport Office, the Board of Passport Appeals, and the Secretary of State, in accordance with the State Department's Passport Regulations, did not "take into consideration confidential security information that was not made available to" appellants. 22 C.F.R. 51.138(b), 51.156, 51.167. The Board of Passport Appeals found on the evidence in the record that each appellant was (R. 14-15, 39):

at all material times * * * a member of the Communist Party with knowledge or notice that such organization has been required to register under [the Internal Security Act of 1950].

The Secretary's decision to adopt the Board's finding as his own was similarly based solely on the record. Appellants do not challenge the correctness of this finding. In short, the sole issue before this Court is whether Section 6 is unconstitutional on its face or as applied. We submit that, while the *Communist Party* case, 367 U.S. 1, considered only the registration provisions of the Act, its rationale goes a long way to establish the constitutionality of the passport provisions.

We will show below that Section 6 does not deny substantive due process. While the right to travel is part of the liberty protected by the Fifth Amendment, the due process clause does not prohibit reasonable regulation of life, liberty, or property. Thus, throughout our history, the right to travel has been limited by denials of passports in the interests of national security.

Congress reasonably could deny passports to members of Communist-action organizations found to be controlled by the world Communist movement and operating to carry out the objectives of that movement. This Court has held in numerous cases that Congress has broad power to pass legislation designed to protect the national security from Communist activity. Congress found in Section 2 of the Act, on the basis of extensive evidence, that the world Communist movement and its branches in the United States posed a grave danger to American security, and these findings have been specifically upheld by this Court. *E.g., Communist Party v. Subversive Activities Control Board, supra*, 367 U.S. at 93-95. Moreover, Congress had similarly found, again on the basis of extensive evidence, that travel by American members of Communist-action organizations contributed substantially to this danger by giving additional opportunity for espionage and propaganda, both in the United States and abroad, permitting the training of American Communist leaders, and facilitating the exchange of information between American Communist leaders and the leaders of the world Communist movement. And whether or not denial of passports to some members of the Communist Party might be deemed not reasonably related to national security, surely Section 6 was reasonable as applied to the top-ranking Party leaders involved here.

Appellants' other constitutional claims are also without merit. Section 6 involves regulation of travel, an area not directly protected by the First Amendment.

Although the prospect of passport denial and the prohibition on travel by Communist Party members may indirectly limit rights protected by the First Amendment, such limitation is within the ambit of Congress' power marked out by the decisions of this Court. Just as it was a reasonable limitation of the right to travel for Congress to deny passports to members of Communist-action organizations in the interests of national security, this same reason equally justifies the incidental limitations on First Amendment rights. See *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 96-97.

Section 6 does not constitute a bill of attainder, since neither the Communist Party nor appellants are named in the Act, denial of passports is not penal in nature, and it applies only to future not past conduct. *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 82-88. And appellants were not denied procedural due process by the fact that the Communist Party was found to be a Communist-action organization as of over ten years ago and that individual members may not relitigate this finding. The Act reasonably treats the organization as the representative of its members in determining whether the organization comes within the Act; the Party may relitigate the Board's finding when it registers under the Act; and, if there is a constitutional claim that the Party is entitled to relitigate the finding without registering, this right belongs to the Party and not to each individual member.

**SECTION 6 OF THE SUBVERSIVE ACTIVITIES CONTROL ACT
DOES NOT VIOLATE SUBSTANTIVE RIGHTS PROTECTED BY
THE FIFTH AMENDMENT**

**A. THE RIGHT TO TRAVEL IS SUBJECT TO REASONABLE CONGRESSIONAL
REGULATION**

In *Kent v. Dulles*, 357 U.S. 116, 125, this Court held that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." It went on to hold that, "if that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129. Congress has exercised that function in Section 6 of the Subversive Activities Control Act of 1950, providing that, when there is in effect a final order of the Subversive Activities Control Board requiring the registration of an organization under Section 7 of the Act, no member of such an organization, with knowledge or notice that such order has become final, shall apply for, use, or attempt to use a passport.

1. The due process clause permits reasonable regulation of the rights which that clause protects

There can be little dispute as to the general power of Congress to regulate rights protected by the due process clause of the Fifth Amendment. "The Constitution * * * speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty.

Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391. Moreover, as Mr. Justice Holmes observed in *Moyer v. Peabody*, 212 U.S. 78, 84, "it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation." Accord, e.g., *Federal Communications Commission v. W.J.R.*, 337 U.S. 265, 275; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 163; *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347.

Thus, the rights to life, liberty, and property protected by the due process clause have never been considered absolute. The right of property is limited by innumerable forms of taxation and regulation. Similarly, the right to liberty may be limited in ways more strict and confining than restrictions on travel outside the United States. For example, compulsory military service takes a man from his residence and occupation for service in the armed forces. See *Selective Draft Law Cases*, 245 U.S. 366. Similarly, children may be required to go to school, the insane may be confined to institutions, and the sick may be quar-

antined, for these are recognized as reasonable limitations on personal liberty.

In short, the due process clause only protects life, liberty, and property by forbidding arbitrary government action, or action without the protection of a fair procedure. Since the right to travel is one aspect of the right to liberty (*Kent v. Dulles*, *supra*, 357 U.S. at 125), it likewise is subject to reasonable regulation.

In *Worthy v. Herter*, 270 F. 2d 905, 909, the Court of Appeals for the District of Columbia Circuit stated that "the right to travel, like every other form of liberty, is, in our concept of an orderly society, subject to restrictions under some circumstances and for some reasons." Similarly, in *Schachtman v. Dulles*, 225 F. 2d 938, 941 (C.A. D.C.), the court held that the right to travel is "subject to the rights of others and to reasonable regulation under law." Accord, *Worthy v. United States*, C.A. 5, decided February 20, 1964. In the *Kent* case itself, this Court suggested that reasonable restrictions of the right to travel were constitutionally permissible since it said that a passport might be denied if "the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." 357 U.S. at 127.

2. *Foreign travel is subject to reasonable regulation to protect national security*

It is well established that, in construing constitutional provisions, history is of crucial significance. In *The Pocket Veto Case*, 279 U.S. 655, 688-690, in referring to a government memorandum based on an exhaustive search of the Archives as to the practical construction placed upon the constitutional provision relating to so-called "pocket vetoes," the Court said that "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." See also, *e.g.*, *Cafeteria Workers v. McElroy*, 367 U.S. 886, 891; *Gramer v. United States*, 325 U.S. 1, 27, 61 (Mr. Justice Douglas dissenting). The authority of Congress to impose reasonable restrictions upon foreign travel has deep historical roots.

a. *Passport requirements.*—Congress enacted the first statute regulating foreign travel almost 150 years ago, in 1815. That statute—Section 10 of the Trading with the Enemy Act of 1815, 3 Stat. 199—passed just prior to the termination of the War of 1812, made it illegal for any citizen to "cross the frontier" into enemy territory "without a passport first obtained from the Secretary of State" or other specified officials. Although the next travel control statute did not appear until World War I, during the Civil War similar restrictions upon foreign travel were accomplished without specific Congressional authorization. Secretary of State William H. Seward is

sued an order prohibiting the departure from, or entry into, any port of the United States of any person who did not have a passport. A subsequent order prohibited the issuance of a passport to any citizen subject to military service, unless he posted a bond. Hunt; *The American Passport* (1898), pp. 49-54; 3 Moore, *International Law Digest* (1906), pp. 1015-1021.

After the outbreak of World War I in 1914, President Wilson, in an effort to prevent American citizens from going to belligerent countries, promulgated rules requiring that passport applicants submit documentary evidence sufficient to "satisfy the Department of State that it is imperative" that they go abroad.²² There was no law, however, which they prevented departure or entry without a passport. It was for this reason that Congress enacted, in 1918, the direct antecedent of the present general travel control statute. That Act prohibited, after a Presidential proclamation, travel abroad without a passport during wartime. Act of May 22, 1918, c. 81, 40 Stat. 559.²³ The House Foreign Affairs Committee, which added

²² See *Foreign Relations of the United States* 1915, p. 912; *For. Rel.* 1916, p. 788; *For. Rel.* 1917, p. 575.

²³ Section 2 of this 1918 Act provided that after the prescribed Presidential proclamation "has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport" (emphasis added).

the prohibition upon travel by citizens (see 56 Cong. Rec. 6029), explained the bill as follows (H. Rept. No. 485, 65th Cong., 2d Sess., pp. 2-3):

The bill is intended to stop an important gap in the war legislation of the United States.

*** American citizens and neutrals [are] perfectly free to come and go. No argument is necessary to indicate the probability that Germany will wherever possible, employ renegade Americans or neutrals as her agents instead of employing Germans about whom suspicion would easily be excited. The danger of the transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers.

*** It will be observed that citizens need not secure such permits as are required of aliens, but must bear valid passports. Passports will continue to be issued as at present by the Department of State, and there is no reason to believe that any American citizen will be unduly inconvenienced by these restrictions. That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong

suspicion that he came to the United States for no proper purpose. * * *

It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. * * *

The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious departures for Cuba which it was impossible to prevent. Other *individual cases* of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes.

In the debates on the floor of Congress it was recognized that "a passport can not be claimed by a citizen as a matter of right." 56 Cong. Rec. 6063.

The 1918 statute was invoked by a Presidential Proclamation of August 8, 1918, which provided in part (40 Stat. 1829, 1831):

1. No citizen of the United States shall receive a passport entitling him to leave or enter

* For the implementing regulations, see Executive Order No. 2932, 2 For. Rel. 1918, p. 815. For the history of those regulations and their operation during World War I, see Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, pp. 1202-1206.

the United States, unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.

This statute was effective only in wartime, and the proclamation terminated on March 3, 1921. Public Resolution No. 64, 41 Stat. 1359. In 1941, after President Roosevelt had proclaimed an unlimited national emergency (Proc. No. 2487, May 27, 1941, 55 Stat. 1647), Congress amended the 1918 Act to provide, *inter alia*, that the Act could be invoked during the then-existing emergency. The pertinent Senate Report stated (S. Rept. No. 444, 77th Cong., 1st Sess., pp. 1-2):

Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States, who desire to travel from time to time between the United States and foreign countries in connection with their activities, as well as others who desire to leave the United States for the purpose of evading justice.

During the last war, when it is believed a lesser number of persons were engaged in espionage and subversive activities in the United States than is now the case, notwithstanding the fact that the United States is not at war, it

was found desirable to enact legislation to provide for the regulation of travel to and from the United States on the part of all persons, citizens as well as aliens. The situation existing throughout the world and the necessity of promoting as far as possible the national defense justify, it is believed, the enactment of legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes.

See also 87 Cong. Rec. 5048-5053, 5386-5388.

Presidential invocation⁶ of this statutory authority, and implementation by the Secretary of State⁷ followed shortly. Despite the termination of the emergency proclaimed in 1941 on April 28, 1952 (Proc. No. 2974, 66 Stat. c31), Congress continued the statutory provisions in effect until April 1, 1953 (66 Stat. 54, 57, 96, 137, 330, 333). *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, note 7. Meanwhile, Congress repealed the 1918 statute as amended

⁶ Proc. No. 2523, November 14, 1941, 55 Stat. 1696. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, note 7; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 599-600; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 540-541.

⁷ Departmental Order No. 1003, 6 Fed. Reg. 6069. These regulations, as amended by Departmental Regulation No. 11, August 27, 1945, 10 Fed. Reg. 11046, are still in effect as 22 C.F.R. Part 53. They were expressly ratified and confirmed in Presidential Proclamation No. 2850, August 17, 1949, 63 Stat. 1289, and were incorporated by reference in Proclamation No. 3004, January 17, 1953, 67 Stat. c31.

The history of the operations of the Passport Office during World War II is set forth in Stuart, *Safeguarding the State Through Passport Control*, 12 Dept. of State Bull. 1066 (1945).

in 1941 (66 Stat. 279) and reenacted it as Section 215 of the Immigration and Nationality Act of 1952, amending it only so as to make its provisions subject to invocation during "any national emergency proclaimed by the President * * *" (66 Stat. 190). This statute is in force today since the national emergency proclaimed by the President during the Korean War is still in effect. Proclamations No. 2914 (December 16, 1960), 64 Stat. 4454, and No. 2974 (April 28, 1952), set out preceding 50 U.S.C. App. 1, and Proclamation No. 3004 (January 17, 1953), 18 Fed. Reg. 489.

b. Denials of passports.—Beginning at least as early as 1819, the Secretary of State denied passports for a variety of reasons. Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 Geo. L.J. 63, 73, note 43. For example, in 1861 Secretary of State Seward warned that the South was (3 Moore, *supra*, p. 920):

sending agents to Europe on errands hostile and injurious to the peace of the country and dangerous to the Union. * * * You are therefore strictly enjoined to grant no passport whatsoever to any person of whose loyalty to the Union you have not the most complete and satisfactory evidence.

The rules of the Department of State relating to passports which were promulgated in 1886 prohibited issuance "to persons engaged in violation of the laws of the United States, e.g., Mormon propagandists." See also Moore, *International Law Digest* (1906), pp. 921-922. This provision was changed in the Passport Rules of 1903 to state that the Secretary would "refuse to issue a passport * * * [to] anyone who he

has reason to believe desires a passport to further an unlawful or improper purpose.” 3 *id.* at 920. In 1901, an opinion of the Attorney General likewise stated (23 Op. Genl. 509, 511):

Circumstances are conceivable which would make it most inexpedient for the public interest for this government to grant a passport to a citizen of the United States. For example, if one of the criminal classes, an avowed anarchist for instance, were to make such an application, the public interest might require that his application be denied.

The Department of State refused a passport in 1907 because evidence showed that the applicant was engaged in “blackmailing projects, and was disturbing, or endeavoring to disturb, the relations of this Country with the representatives of foreign countries.” 2 *For. Rel.* 1907, pp. 1082-1083.

During World War I, the danger from the use of American passports for espionage and participation in belligerent activities resulted in a rule forbidding issuance of passports for travel to belligerent countries except in cases of necessity. After the United States entered the war, the same rule applied to passports for travel to any country. 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), p. 1196.

Passports were first denied to Communists after the Soviet Revolution in 1917 when the United States “became aware of the scope and changes of the world-wide revolutionary movement and the attendant purpose to overthrow all existing governments, including

our own." "Refusal of Passports to Communists," State Department Memorandum, May 29, 1956, quoted in Appendix B, pp. 82-84. As a result, passports were denied "American Communists who desired to go abroad for indoctrination, instructions, etc." *Ibid.** In 1920, a memorandum of the Under Secretary of State (November 30, 1920) stated:

It is therefore recommended that passports be refused to persons who fall within any of the following categories.

(1) Any person who counsels or advocates publicly or privately the overthrow or the bringing about of reforms or changes in organized Governments by force:

(Example) Members of the Communist Party; the I.W.W.; the Communist Labor Party; or any other organization of a similar nature.

(2) Any person who actively espouses the cause of the Soviet Government either through public expression or by the distribution or dissemination of Bolshevist propaganda.

(3) Any person who is directly or indirectly working for the Bolshevist Government, (a) correspondents of publications such as the London Daily Herald, Soviet Russia, and other known Bolshevist organs; (b) Employees of the Soviet Government in this and other countries; and (c) carriers of Bolshevist correspondence.

* In *Kent v. Dulles*, 357 U.S. 116, this Court held that the Secretary of State did not have authority to deny passports to Communists in the absence of statutory authorization such as explicitly exists in this case. However, the history of such denials demonstrates that Section 6 is not a new or rash departure from the past.

A few days later, on December 16, 1920, the Department issued the following instructions:

The Department will refuse passports to radicals who fall within any one of the following classes:

Citizens who are anarchists; citizens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; citizens who disbelieve in or are opposed to all organized government; citizens who advocate or teach the assassination of public officials; citizens who advocate or teach the unlawful destruction of property; citizens who are members of, or are affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property.

The policy of denying passports to Communists was terminated in 1931 and such passports were issued until World War II. State Department Memorandum, May 29, 1956. At that time passports were

denied to Communists. The policy was again changed in 1948 to allow their issuance to "Communists and supporters of Communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities. At the same time the decision was made that passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States." *Ibid.* In 1950, however, the Department again decided to deny all passports to Communists, because such passports had been used for espionage and propaganda purposes for the Soviet Union. *Ibid.* Thus, prior to the passage of this Subversive Activities Control Act, as well as after it, the Secretary of State denied passports to Communists "in the interests of national security." S. Rept. 2369, Part 2, 81st Cong., 2d Sess., pp. 3, 10; 96 Cong. Rec. 13755-13756, 14538, 14599-14600.

The result of denial of passports has been that, whenever the statutes or orders barring travel without a passport were in effect, American citizens were prevented from traveling abroad. Those statutes and orders have applied in wartime or national emergency. In short, history confirms that the right to travel has never been deemed to be absolute but is instead subject, like all rights protected by the due process clause, to reasonable regulation, especially where regulation may be deemed to protect national security.

B. THE RESTRICTIONS WHICH SECTION 6 IMPOSES UPON THE USE OF PASSPORTS FOR FOREIGN TRAVEL BY PERSONS WHO CHOOSE TO REMAIN MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS IS REASONABLY RELATED TO SAFEGUARDING THE NATIONAL SECURITY

1. Congress had ample evidence upon which to find that members of Communist-action organizations were likely to abuse passports for foreign travel in such a manner as to endanger national security

The right of Congress to exercise its legislative power in order to preserve the national security against Communist subversion and aggression is no longer open to debate. In *Barenblatt v. United States*, 360 U.S. 109, 127, the Court held:

That Congress has wide power to legislate in the field of Communist activity in this country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court * * *. In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society," *Dennis v. United States* * * *.

See also *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1; *Galvan v. Press*, 347 U.S. 522, 529; *Carlson v. Landon*, 342 U.S. 524, 534-536; *Harisiades v. Shaughnessy*, 342 U.S. 580, 590; *Dennis v. United States*, 341 U.S. 494; *American Communications Ass'n v. Douds*, 339 U.S. 382, 387-389. Since, as we have seen, the right to travel is not absolute, Congress has ample power to restrict the use of passports, not only in an exercise of the right to regulate foreign commerce but also in legislating concerning foreign affairs, where it reasonably finds the restriction appropriate to safeguard the national security.

At this date it seems equally unnecessary to call attention to the evidence before Congress and its findings concerning the nature of the worldwide Communist conspiracy and its danger to the United States. We summarize the historical materials in Appendix C below, pp. 89-100. Here it is enough to say that Congress found in the Act in question that the Communist movement in the United States is a disciplined organization dedicated to overthrow of the Government by force and violence and directed by a Communist dictatorship abroad, which establishes "action organizations" in various countries, including the United States. This Court has not only accepted the findings of Congress in this very statute (*Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 93-95) but earlier recognized the character of the worldwide Communist effort to overthrow the Government of the United States. See *American Communications Assn. v. Douds*, 339 U.S. 382, 388-389, 423; *United States v. Dennis*, 183 F. 2d 201, 212-213, affirmed, 346 U.S. 494; *Galvan v. Press*, 347 U.S. 522, 529; *Barenblatt v. United States*, 360 U.S. 109, 127-129 (see Appendix C, pp. 100-108). We therefore turn directly to the historical background and Congressional findings underlying Section 6.

The decision embodied in Section 6, to deny the use of passports to persons who continue to retain membership in what is found to be a Communist-action organization, was the culmination of investigations by Congressional committees and executive agencies as well as individuals and private organizations.

The findings demonstrate the abuse of United States passports by members of the Communist Party.

Throughout the 1930's and 1940's former members of the Communist Party testified before Congressional committees concerning the importance of foreign travel to the maintenance of the bonds between Communist organizations throughout the world. As one commentator described these accounts (Moore, *The Communist Party of the USA; An Analysis of a Social Movement*, 39 Am. Pol. Sci. Rev. 31, 32 (1945)):

Various renegades from the party and from the International have described in some detail the system of communication by secret couriers, codes, and ciphers, as well as resident agents of the Communist International and the OGPU, Soviet Secret Police, used to keep the various Communist parties, including that of the United States, under the discipline of the Russian rules.

The Commission on Government Security¹ stated in its 1957 Report (quoted in part in the Appendix, pp. 81-87) that "The passport is an important instrument in support of the recognized Communist technique of communication by personal contact" (p. 470). The Commission also stated that the passport "has been employed over the years to insure the presence of American Communists and Americans under Com-

¹ The Commission, which was provided for by P.L. 304, 84th Cong., included four members appointed by the President, four by the Vice President, and four by the Speaker of the House of Representatives.

munist discipline at Soviet centers for indoctrination and training including the Lenin school in Moscow."

Ibid. Similarly, the 1947 report of the House Committee on Un-American Activities (H. Rept. No. 2742, 79th Cong., 2d Sess., p. 12) stated that it had found:

10. Evidence that for many years the Russian Government maintained in Moscow a school for the training of leaders of foreign Communist Parties. Scores of the leaders of the American Communist Party, such as Clarence Hathaway, have passed through this school, and some of its graduates have been among the committee's witnesses, such as William Nowell. The training which these leaders have received in Moscow has included preparation for eventual uprisings and civil war in the United States.

11. Visits of American Communist Party leaders to Moscow, Russia. For instance, when Earl Browder was deposed as the leader of the Communist Party of the United States he made the statement that "I intend to appeal the decision of the National Convention (which deposed him) to the International Body. * * *

A former leader of the Communist Party has written that Eugene Dennis, later the Party's chairman, travelled to the Soviet Union for "training as an OGPU [Soviet intelligence] operative and Comintern agent." Gitlow, *The Whole of Their Lives* (1948), p. 365.

American passports have also been used for activities in foreign countries contrary to American security. As summarized in the Report of the Commission on Government Security, pp. 470-471:

The passport * * * has been utilized by Communist sympathizers as a vehicle for their at-

tendance at and participation in activities of international Communist propaganda organizations.

* * * [E]ver since the end of World War I, American Communists and alien Communists illegally in possession of American passports had effectively carried on abroad espionage, propaganda and revolutionary activities on behalf of the Soviet Government and the international Communist movement and contrary to the foreign policy of the United States Government.

For example, an American Communist participated, until captured and imprisoned by the Philippine Government, in the Huk (Communist) rebellion there after World War II.

Finally, American passports have been used to allow Soviet agents to enter the United States. A memorandum of the Under Secretary of State dated November 30, 1920, stated that a passport of a Communist had been "taken up by the Bolshevik authorities and it was subsequently reported that it had been given to a dangerous Bolshevik agitator by the name of Malkin who would endeavor to gain admission to the United States through its use." Respondent's brief in *Kent v. Dulles*, No. 481, Oct. Term, 1957, p. 124. Similarly, during the Spanish Civil War the passports of several thousand Americans who joined the International Brigade eventually found their way to Moscow for alteration and use by Soviet agents. *Report of the Commission on Government Security*, p. 472. See also *Hearings on Scope of Soviet Activity in*

the United States, Internal Security Subcommittee, May 9-10, 1956, pp. 1220-1222.

The former chief of Soviet Intelligence in Europe wrote (Krivitsky, *In Stalin's Secret Service* (1939), p. 95):

All the volunteers' passports were taken up when they arrived in Spain, and very rarely was a passport returned. Even when a man was discharged he was told that his passport had been lost. From this action alone about 200 volunteers came over, and genuine American passports were highly prized at OGPU headquarters in Moscow. Nearly every diplomatic pouch from Spain that arrived at the Lubianka contained a package of passports from members of the International Brigade.

Several times while I was in Moscow in the Spring of 1937, I saw this mail in the offices of the foreign division at OGPU. One day a package of about 100 passports arrived; half of them were American. They had belonged to dead soldiers. That was a great haul, a cause for celebration. The passports of the dead, after some weeks of inquiry into the family histories of their original owners, were easily adapted to their new bearers, the OGPU agents.

Similarly, Gitlow wrote that Comintern representatives sent by the Soviet Union to the American Communist Party used (*The Whole of Their Lives*, p. 151):

* * * genuine American and Canadian passports secured for them in the name of American and Canadian citizens by the underground.

passport bureau of the Communist Party. These passports eventually went into the hands of the OGPU where exact duplicates were forged which together with the originals, were supplied to its agents and spies for their personal use in traveling over the world.

Prior to World War II an espionage agent was arrested in Copenhagen and was found to have four United States passports in his possession. *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, on Scope of Soviet Activity in the United States*, Part 23, 84th Cong., 2d Sess., pp. 1215-1216.⁹

Such misuse of American passports does not merely allow Communist agents to commit espionage and related subversive activities, it also undermines the value of American passports generally. Thus, the

⁹ American Communist leaders have also fraudulently obtained passports. See, e.g., *Browder v. United States*, 312 U.S. 335; *Warszower v. United States*, 312 U.S. 342; *Eisler v. United States*, 176 F. 2d 21 (C.A. D.C.), certiorari denied, 327 U.S. 958; *United States v. Rubenstein*, 151 F. 2d 915 (C.A. 2), certiorari denied, 326 U.S. 766. Hundreds of similar instances have occurred. See, e.g., *Hearings before the Committee on Un-American Activities, House of Representatives, 84th Cong., 2d Sess., dated May 1956, entitled "Investigation of the Unauthorized Use of United States Passports,"* Part I, pp. 4303-4305, Part III, p. 4491; *Hearings before Committee on Un-American Activities, April 22-24 and June 5, 1959, entitled "Passport Security,"* Part I, pp. 663-665, Part 2, pp. 741-748, 880; annual report, 1959, House Committee on Un-American Activities, H. Rept. No. 1251, 86th Cong., 2d Sess., pp. 43-53; Gidlow, *The Whole of Their Lives* (1948), pp. 323, 365.

Communist forgery of Czech passports before World War II led to suspicion against all holders of such passports. Dallin, *Soviet Espionage* (1955), p. 97. During the early years of World War I, Americans were arrested in the belligerent countries as a result of the fact that American passports "had been fraudulently obtained and used by German subjects. * * * Such fraudulent use of passports by Germans themselves can have no other effect than to cast suspicion upon American passports in general." *Foreign Relations of the United States*, 1916, p. 8. The State Department was required to file "vigorous protests" with the foreign governments in order to obtain the release of those arrested. *Ibid.*

The examples could be multiplied. It is sufficient to say that on the basis of such evidence, Congress was fully justified in finding in Section 2(8) of the Act:

Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

Subsequent investigations confirm the Congressional finding. In the proceeding leading to the order of the Subversive Activities Control Board directing the Communist Party to register under the Act, the Board heard evidence that American Communists had

secured in the Soviet Union the traditional indoctrination given to most non-Russian Communist leaders, and that travel abroad by American Communist leaders had facilitated their effectiveness as couriers both of intelligence to foreign countries and of directives to this country. See the Record in *Communist Party v. Subversive Activities Control Board*, No. 12, Oct. Term, 1960, pp. 2596-2613.¹⁰ Similarly, after the Act was passed, a former officer of the intelligence branch of the MVD, who defected to the West in Tokyo in January 1954, testified that the organized use of United States passports for Soviet espionage purposes continued through that time (*Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, on Scope of Security Activity in the United States*, Part 1, 85th Cong., 2d Sess., p. 21):

Mr. RAŠVOROV. The Military Intelligence Service and Political Intelligence Service, MVD, have special sections, so-called section of illegal intelligence work abroad. In other words, these sections, GRU and MVD, engage in training their own intelligence personnel in order later, after sending many illegally to foreign countries, and particularly in United States and Great Britain, and for these purposes they are very interested in getting documents in foreign countries, in other words, all kinds of official documents, and especially pass-

¹⁰ Appellants' contention (Br. 31-37) that the Board's findings were inconsistent with the Act is discussed below, pp. 42-45.

ports, diplomatic, business passports and so on and so on.

They are really interested in this and doing their best to get these passports in order to forge them and send people, they call here sleepers to these countries, and particularly in United States. The United States, at the present time, is the main object for these purposes.

Mr. MORRIS. Getting hold of the American passports?

Mr. RASTVOROV. Yes.

Mr. MORRIS. It is considered to be a very desirable thing for Soviet intelligence purposes?

Mr. RASTVOROV. Yes, very.

* * * * *

Senator WELKER. Mr. Rastvorov, do you think it is advisable for Communists here in the United States to seek and obtain passports and travel abroad, go overseas?

* * * * *

Mr. RASTVOROV. Yes, it is a very good idea for Communist purposes.

Senator WELKER. How is it with respect to our Government's purposes, the United States?

Mr. RASTVOROV. It is very undesirable for United States Government to permit people, especially Communists or so-called pro-Soviet type, to travel in foreign countries, especially in Soviet Union and in Eastern Europe with these passports, because it is very dangerous, as I mentioned before.

Mr. MORRIS. Do you know what they do with these passports?

Mr. RASTVOROV. Yes, they use it for intelligence purposes.

In sum, Congress had ample evidence that the use of passports by American members of the world Communist movement is a threat to national security. Passports had been generally denied to Communists since the Soviet Revolution. When Congress, in 1950, determined that foreign travel "is a prerequisite for the carrying on of activities to further the interests of the world Communist movement" (Section 2(8)), it had evidence that foreign travel and the use of passports by Communist Party members had five dangerous consequences: they (1) enabled the leadership in the world Communist movement in the Soviet Union to give orders to their followers in the United States and to exchange secret information with them; (2) facilitated the training of American Communist leaders by leaders of the world Communist movement; (3) allowed the world Communist movement to exercise closer control over its American Communist branches; (4) gave American Communists the opportunity to carry on espionage, propaganda, and revolutionary activities abroad; and (5) provided world Communist leaders with passports for Soviet secret agents to use in the United States and elsewhere.

2. *The risks of injury to the national security as a result of abuse of passports for foreign travel furnish a rational basis for denying passports to members of Communist-action organizations*

The evidence before Congress and the ensuing Congressional findings concerning abuse of United States passports by members of the American Communist Party amply demonstrate that the restric-

tions which Section 6 imposes upon foreign travel are measures reasonably related to the protection of the national security against dangers of aggression and subversion directed by an international conspiracy which is controlled by a foreign power and devoted to its revolutionary objectives. The degree of restraint upon liberty is outweighed by the dangers to be met. *Mayer v. Rusk*, 224 F. Supp. 929 (D. D.C.); *Copeland v. United States*, S.D. N.Y., No. 1409-63, decided January 23, 1964. See *Briehl v. Dulles*, 248 F.2d 561, 571-573 (C.A. D.C.), reversed on other grounds *sub nom*, *Kent v. Dulles*, 357 U.S. 116; *Dayton v. Dulles*, 254 F.2d 71, 73-74 (C.A. D.C.), reversed on other grounds, 357 U.S. 144; *Zemel v. Rusk*, D. Conn., Civ. No. 9549, decided February 21, 1964.

There is nothing novel in denying passports during periods of war or national emergency in circumstances where there is a reasonable basis for the belief that they will be used against the United States and to aid its enemies. On the contrary, civilized nations have long regarded foreign travel by their citizens as subject to control in the national interest. During the Civil War citizens were denied passports when the Government believed that they intended to harm the northern war effort during their travel abroad. In World War I citizens were initially barred from traveling to enemy countries and later from journeying to non-enemy nations. The current prohibitions in Section 6 have a similar function.

Numerous commentators have recognized the constitutionality of denying passports to members of

Communist-action organizations. The Commission on Government Security, while recommending a number of administrative and other changes in the 1950 legislation, reached the following basic conclusion (p. 470):

A passport security program is necessary to deter travel abroad by subversives bent on missions detrimental to the United States and to narrow as much as possible the sphere of Soviet international conspiratorial activity in the fields of espionage and propaganda.

One of the most acute critics of the State Department's passport program, Professor Louis J. Jaffee of the Harvard Law School, has stated (*The Right to Travel: The Passport Problem*, 35 Foreign Affairs 17, 26-27 (Oct. 1956)):

In the Civil War and again in World War I, the United States set up a rigid system of passport control. The criterion here is the defense of the country from external enemies. It is asserted that the precedents of "war" have no relevance to "peace." But the critical consideration is defense against an external enemy; and communication abroad between our citizens and the enemy cannot by its nature be controlled by the usual criminal process. The facts in a particular case as to the citizen's intention are inevitably speculative: all is to be done after the bird has flown. Now our Congress and the Administration have concluded that the Communist International is a foreign and domestic enemy. We deal with its domestic aspect by criminal process; we would seem justified in dealing with its external as-

pect by exit control. If an avowed Communist is going abroad, it may be assumed that he will take counsel there with his fellows, will arrange for the steady and dependable flow of cash and information, and do his bit to promote the purposes of the "conspiracy."

* * * [D]espite the heavy risks of maladministration, the United States is, in my opinion, justified in denying passports to persons whose journey abroad is presumptively in furtherance of the Communist "conspiracy." If such a policy is not clearly required, it is, I think, within the range of reasoned choice and not violative of fundamental principle.

See also Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 Geo. L. J. 63, 89-90; Note, "Passport Denied": *State Department Practice and Due Process*, 3 Stanford L. Rev. 312, 322.

The limitations that Section 6 imposes upon the right to travel are less onerous than other statutory limitations upon the liberty of members of the Communist Party which this Court has already sustained. Union officers who were members of the Communist Party could not retain their positions under the Labor Management Relations Act if the Union desired to use the services of the National Labor Relations Board. *American Communications Assn. v. Douds*, 339 U.S. 382. Deportation of former members of the Communist Party is permissible because "the Communist movement has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists." *Hari-*

siades v. Shaughnessy, 342 U.S. 580, 590. Accord, *Galvan v. Bress*, 347 U.S. 522. Similarly, in *Carlson v. Landon*, 342 U.S. 524, the Court upheld a provision of the Internal Security Act of 1950 allowing the Attorney General to hold members of the Communist Party in custody without bail pending determination of their deportation. See also *Flemming v. Nestor*, 363 U.S. 603.

The Court has also upheld State laws imposing far more severe restrictions upon members of the Communist Party. In *Gerende v. Board of Supervisors*, 341 U.S. 56, the Court held unanimously that Maryland could require every candidate on the ballot to swear in an affidavit that he was not engaged in any attempt to overthrow the government by force and violence. *Garner v. Board of Public Works*, 341 U.S. 716, held that a city has power to require its employees to execute affidavits stating that they had not advocated or been members of an organization which advocated forcible overthrow of the government and disclosing whether they were or had ever been members of the Communist Party. *Adler v. Board of Education*, 342 U.S. 485, similarly determined that a New York statute, which makes any member of an organization advocating the overthrow of the government by force or violence ineligible for employment in the public schools, was constitutional. *Beilan v. Board of Public Education*, 357 U.S. 399, and *Berner v. Casey*, 357 U.S. 468, held that State officials could question employees about their Communist affiliations and discharge them if they refused to answer. And in *Konigsberg v. State Bar*, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82, this Court held that a State could constitutionally

deny admission to the Bar to applicants who refused to answer questions pertaining to membership in the Communist Party. The practical effect of such measures was to deny public office or public employment to members of the Communist Party.

We turn now to a number of subsidiary arguments raised by appellants.

(a) There is no merit to the contentions (Br. 30-31) that if Communists may be denied passports for foreign travel, they may be prohibited from domestic travel or confined to concentration camps; and that if Communists may be so treated, so may other Americans considered dangerous. Under the due process clause the constitutionality of any legislation restricting the rights of life, liberty, and property depends upon the character of the restriction as well as the gravity of the evil which the legislation seeks to remedy. Confinement to a concentration camp or restriction upon domestic travel is obviously a much greater curtailment of liberty than the refusal of a passport for travel to Cuba or outside the Western Hemisphere. There was also ample evidence of the abuse of passports for foreign travel by Communists as members of a worldwide conspiracy endangering the national security. Consequently, this case carries no implications as to other restrictions or as to the denial of passports to members of organizations concerning which such evidence is lacking.

(b) There is no irrationality in adopting legislation aimed at the demonstrated abuse of passports while recognizing that "the world Communist movement

may seek to realize its alleged objective in the United States by peaceable, constitutional means" (Br. 19). Section 6, like the Act as a whole, is aimed at conspiratorial activities, fraud, deceit, and subversion. Toleration of peaceable constitutional methods attests confidence in open political processes with full opportunity for normal political association and freedom of debate. The fact that a person or organization is engaged in some constitutionally protected activities does not remove other aspects of his conduct from reasonable regulation. *Prince v. Massachusetts*, 321 U.S. 158; *Jacobson v. Massachusetts*, 197 U.S. 11; *Hamilton v. Regents*, 293 U.S. 245, 267; *Reynolds v. United States*, 98 U.S. 145; *Cleveland v. United States*, 329 U.S. 14, 20; *Stansbury v. Marks*, 2 Dall. 213; *People v. Vogelgesang*, 221 N.Y. 290. In *American Communications Assn. v. Douds*, *supra*, 339 U.S. at 393, the Court upheld legislation prohibiting labor unions from using the services of the National Labor Relations Board unless their officers filed non-Communist affidavits, even though it expressly assumed that Communists "carry on legitimate political activities."

(c) Appellants' arguments (Br. 22-26) based upon President Truman's veto of the Internal Security Act of 1950 and subsequent proposals to revise the passport legislation, not only rest upon misconceptions but ignore the fundamental principle that it is for the Congress, not the courts, to choose between alternative policies.

President Truman's veto furnishes no evidence that Section 6 is not required by considerations of national security. The fact is that President Truman stated

that Section 6 was unnecessary because "the Government can and does deny passports to Communists under existing law." 96 Cong. Rec. 15631. The minority of the Senate Committee Report on the bill also noted that "the Secretary of State has denied passports to Communists and others in the interest of national security." S. Rept. 2369, Part 2, 81st Cong., 2d Sess., pp. 3, 10. See also 96 Cong. Rec. 13755-13756, 14538, 14599-14600.

The subsequent measures debated in Congress, including the bill which passed the House of Representatives in 1958, adopted a somewhat different approach to the abuse of passports by Communists, for they vested wider discretion in the Secretary of State. Nevertheless, all of them would have authorized the Secretary to refuse passports to members of the Communist Party when he found that their travel would be harmful to American security. The bill which passed the House restated Congress' earlier finding that the international Communist movement endangers American security and that travel by "agents is a major and essential means by which the international Communist movement is promoted and directed" (see App. Br. 25, note 24).

In any event, the choice between alternative policies is one for the Congress. The fact that it has considered alternatives has no tendency to show that it made an unconstitutional choice.

(d) Appellants also claim (Br. 31-37) that "[t]he factual assumptions on which Section 6 is predicated cannot justify its application to members of the

Communist Party because these assumptions are negated by the findings of the Board in the [Communist] Party case." Specifically, appellants contend that the Subversive Activities Control Board made no finding to support the Congressional finding that foreign travel by Communists "is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement" (Sec. 2(8)), and that the Board's findings were inconsistent with that of Congress that the activities of "the Communist organization in the United States * * * and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States" (Section 2(15)).

This contention is based on an erroneous assumption—that the Board was required to make these findings and that the findings of Congress were not binding on it. The Act required only that the Board find that the Communist Party was controlled by the foreign government or organization controlling the world Communist movement and was operated primarily to advance the objectives of that movement as described in Section 2 (Section 3(3)). While these objectives included forcible overthrow of the American government, there was no requirement to show a clear and present danger that this would occur. Similarly, the findings in Section 2 were not factors which the Board was directed to consider in Section 13(e) in determining whether an organization was a Communist-action organization. Therefore, the Board was neither required to find that, nor even to consider,

whether, foreign travel was important to the world Communist movement or its American branches, or whether these groups posed a clear and present danger to American security. Moreover, the Board could not properly have found that travel was unimportant to Communism or that Communism presented no danger, since this Court has held that the findings of Congress in Section 2 are binding on the Board. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 112; see also *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 465-466; *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153; *Galvan v. Press*, 347 U.S. 522, 529; *Carlson v. Landon*, 342 U.S. 524, 535-536. There was, therefore, no need for the Board to make findings which supported those of Congress and, if it had made inconsistent findings, they would have been invalid.

In addition, the Board's findings do support those of Congress concerning the importance of foreign travel to the world Communist movement. It found, for example, that the present leaders of the American Communist Party have traveled to the Soviet Union on Party business, been indoctrinated and trained in the Soviet Union on Communist strategy and policies, and have acted as couriers between the Communist Parties of the two countries. See the Record in *Communist Party v. Subversive Activities Control Board*, No. 12, Oct. Term, 1961, pp. 2596-2613. While these findings were made in connection with the Board's findings on the topics of foreign "financial aid," "training," and "reporting," upon which the

Board did not rely in making its ultimate determination (see *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 58), they are consistent with, and lend support to, Congress' findings in the Act. And while the Board made no finding of clear and present danger, it made no determination inconsistent with that of Congress in Section 2.

(e) Appellants contend (Br. 27-31) that, even if the classification established by Section 6 were reasonable, "it would be an unconstitutional abuse of government power to deny persons the right to travel merely because of a likelihood that they would abuse the right." In particular, they argue (Br. 29-30) that national security could not be endangered by the travel abroad of American Communists unless it were "followed by overt conduct in this country," and that criminal statutes are capable of dealing with such conduct. Surely, however, Congress has broad discretion in determining the best means for dealing with a serious evil, and particularly one which, like the world Communist movement, threatens national security.

Moreover, the remedy adopted by Congress in Section 6 is an appropriate measure. Congress could reasonably conclude from the evidence before it that the danger to national security could not be prevented by enforcement of criminal statutes within this country. First, American Communists can also endanger our security by actions committed overseas—such as by conveying information obtained by espionage in the United States, committing espionage overseas, train-

ing for future activities in the United States, and the like. Second, the dangers presented by American Communists traveling abroad do not necessarily involve criminal conduct either here or overseas. For example, the transmittal of orders from world Communist leaders to the American Communist Party and the training of American leaders is not illegal. Third, since Congress found that "Communist-action organizations" threaten the national security because they are a secret conspiratorial organization controlled by the world Communist movement to carry out its objectives, it obviously would not be enough to make it criminal to forbid deceit and other surreptitious abuse of passports which could be uncovered only occasionally. Fourth, Congress may adopt measures reasonably adapted to breaking or disclosing Communist links to a foreign power even though it does not, and perhaps may not, forbid all Communist activities and associations. The Smith Act (18 U.S.C. 2385) makes illegal only advocacy of forcible overthrow or knowing membership in an organization advocating forcible overthrow. *Scales v. United States*, 367 U.S. 203; *Yates v. United States*, 354 U.S. 298. Indeed, it is doubtful that Congress could, consistent with the First Amendment, make all activities of the Communist Party a criminal offense unless they were connected with at least some advocacy of violent overthrow. *Id.* at 319. Nevertheless, Congress may regulate other activities connected with specific abuses upon lesser grounds. For example, Congress may properly prevent unions led by Communists from using the services of the National Labor Relations Board and may deport members of the Communist

Party without any proof that the Party or its individual members advocate forcible overthrow of the government. *American Communications Assn. v. Douds*, *supra*; *Galvan v. Press*, *supra*. Congress may equally refuse to allow members of such an organization to travel overseas.¹¹

(f) Appellants contend (Br. 15) that Section 6 is unconstitutionally broad because it does not require that the member "know or believe that the organization is a Communist-action or Communist-front organization as defined in the Act and found by the Board." The provisions of Section 6, however, are explicitly applicable only when the members of an organization have "knowledge or notice" either that the organization has registered voluntarily or has been finally ordered to do so after judicial review. The Act provides that publication in the Federal Register of the fact that an organization has registered or been finally ordered to register "shall constitute notice to all members of such organization" that it has so registered or been finally ordered to do so (Sections 9(d), 13(k)). Since appellants do not claim that they themselves lacked actual notice or challenge the validity of these provisions (see Br. 74, note 34), we shall not discuss them other than to state that their validity is clear under such decisions as *United States v. Balint*, 258 U.S. 250, 252, and *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68-70.¹²

¹¹ The constitutionality of Section 6 under the First Amendment is discussed below at pp. 54-64.

¹² Appellants also challenge (Br. 74) the validity of the requirement in Section 6(b) that passport-issuing officers deny passports to applicants whom they have "reason to believe" are members of an organization registered or required to register

3. *The Congressional decision to deny passports to all members of Communist-action organizations does not result in an excessively broad classification.*

Although appellants focus much of their attack upon Section 6 on the fact that passports are denied to all members of Communist-action organizations without investigation of individual circumstances, contending that not every member who travels is a threat, they suggest no reason for concluding that the denial of passports to appellants themselves is unrelated to the abuses and dangers with which Congress was legitimately concerned. They do not claim to be the hypothetical persons affected by the fact that, as they say (Br. 16), "Section 6 does not even give the Secretary a measure of administrative discrimination which might, for example, permit the issuance of a passport for a last visit to a dying parent or for medical care unobtainable in this country." If appellants had any such reason for traveling they could apply to the Secretary, not to waive Section 6, but to exercise his discretion to authorize travel abroad without a passport in emergency situations. 22 C.F.R. 53.3(h). Nor can appellants possibly claim that they were not active, knowledgeable, and meaningful members of the Communist Party. Cf. *Galvan v. Press*, 347 U.S. 522; *Rowoldt v. Perfetto*, 355 U.S. 115; *Gastelum-Quinones v. Kennedy*,

under Section 7. In this case, the passports were denied on the basis of "knowledge," based on evidence of record adduced at a full hearing, not on "reason to believe," that appellants were members of the Communist Party. Since appellants have not contested this factual determination, this issue is not before the Court.

374 U.S. 469. They are the chairman of the Party and the editor of one of its leading journals, respectively. They are exactly the kind of Party members whom Congress could reasonably believe should be barred from travel. The question whether it is reasonable to deny passports to lesser members of the Communist Party or members having more compelling reasons to travel need not be resolved until the question is actually presented. In other words, appellants cannot invoke the rights of other Party members when the denial of passports to them was plainly related to national security.¹³

On the merits, we submit that Congress acted reasonably in treating all members of Communist-action organizations alike. We agree with appellants (see Br. 18, 22) that it is not likely that *all* members of the Communist Party travel abroad to further the purposes of the world Communist movement or that *all* will endanger the national security whenever they travel abroad. But it was reasonable for Congress to determine that the danger of such evils resulting from the travel abroad of any particular member, and particularly Party leaders, was so serious as to require the prohibition. It is almost impossible to determine in advance—or often even afterwards—

¹³ As this Court observed in *Yakus v. United States*, 321 U.S. 414, 434, "it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations * * *, said to violate due process, which have never been brought here for review * * *"

the purpose of travel abroad if the applicant for a passport wishes to conceal it. *A fortiori* its probable effect on American security cannot be accurately predicted.

Communists have frequently stated that they intended to travel only to certain countries and then have breached restrictions on their passports by traveling to Eastern Europe. This has been concealed by arranging for their passports not to reflect such travel. See H. Rept. No. 53, 85th Cong., 1st Sess., p. 14; S. Doc. 41, 83d Cong., 1st Sess., p. 106; Report of the Commission on Government Security (1957), p. 475; see also pp. 29-31 above. Congress had not the slightest reason for believing that members of the Communist Party would hesitate to conceal their true purpose in traveling abroad today. For Congress found in Section 2 of the Act that the Communist movement in the United States is organized on a secret, conspiratorial basis and subject to rigid discipline in order to carry out the objectives of the world Communist movement including overthrow of the government of the United States. In these circumstances, Congress reasonably determined that the connection between Communist organizations in this country and the world Communist movement was such that it could not take the risk that foreign travel which was purportedly innocent might turn out to be for the purpose of serving the Soviet Union—for espionage, for communication of information, for training, etc. See Jaffe, *The Right To Travel: The Passport Problem*, 35 Foreign Affairs, 17, 26-27 (1956).

The fact that all persons in a class may not engage in the harmful conduct does not make a classification improper so long as it is reasonable. In *Westfall v. United States*, 274 U.S. 256, 259, the Court stated that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." Similarly, in *North American Co. v. Securities and Exchange Commission*, 327 U.S. 686, 710-711; the Court stated: "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." Section 6, like Section 11(b)(1) of the Public Utilities Holding Company Act, which was involved in the *North American* case, "is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil." *Ibid.* See also *American Communications Assn. v. Douds*, *supra*, 339 U.S. at 406; *Purity Extract Co. v. Lynch*, 226 U.S. 192, 201-202, and cases therein cited. Preventive measures such as Section 6 are different from the imputation of personal guilt to an individual for purposes of punishment or the like.

We have seen that this Court has upheld numerous federal and State statutes which had the effect of limiting the liberty of members of the Communist Party as a class without differentiating among them. See pp. 38-40, 41 above. In numerous other cases, the Court has upheld legislation dealing with a group or a class even though the evil to be remedied did not necessarily

apply to every member of the class. For example, this Court upheld a federal statute excluding anarchists from this country and recognized that Congress could constitutionally exclude Communists in *Schneiderman v. United States*, 320 U.S. 118, 132, 163, 172. In *Hawker v. New York*, 170 U.S. 189, the Court held that a State could constitutionally prevent persons who had previously been convicted of a felony from practicing medicine. Cf. *Dent v. West Virginia*, 129 U.S. 114. While a State may not constitutionally ban aliens arbitrarily from lawful occupations (*Truax v. Raich*, 239 U.S. 33), this Court has held that a State may guard against the presumed evil propensities of certain aliens by prohibiting all aliens from operating pool halls (*Clarke v. Deckebach*, 274 U.S. 392, 396-397), engaging in the insurance business (*Pearl Assurance Co. v. Harrington*, 38 F. Supp. 411 (D. Mass.), affirmed, 313 U.S. 549), shooting wild game or carrying arms used for sporting purposes (*Patson v. Pennsylvania*, 232 U.S. 138), and even from owning land (*Terrace v. Thompson*, 263 U.S. 197; *Porterfield v. Webb*, 263 U.S. 225; *Webb v. O'Brien*, 263 U.S. 313).

Appellants cite (Br. 19-22) *Scales v. United States*, 367 U.S. 203, *Adler v. Board of Education*, 342 U.S. 485, and *Wieman v. Updegraff*, 344 U.S. 183, for the proposition that Section 6 is invalid because "individual guilt or disqualification may not be conclusively presumed from membership in Communist organizations." The Court has never stated so loose a generalization without regard to the subject matter of the regulation and the legislative findings upon which it is based. There are many instances in which Congress

has enacted and the Court has sustained legislation making membership in the Communist Party conclusive for the purposes of a particular regulatory measure. *E.g.*, *American Communications Assn. v. Douds*, 339 U.S. 382; *Galvan v. Press*, 347 U.S. 522.

Each of the cases cited by appellants rests upon the terms of the particular statute and the character of the regulation.

In *Scales* the Court concluded as a matter of statutory interpretation that the Smith Act, which inflicted criminal penalties for membership, was intended "to reach only 'active' members having also a guilty knowledge and intent." 367 U.S. at 228. This interpretation was dictated by the fact that the Smith Act is a criminal statute that directly prohibits membership in organizations falling within its terms. The Subversive Activities Control Act does not prohibit membership in any organization and it is, therefore, unnecessary to use the narrowing construction of the *Scales* case to preserve the constitutionality of Section 6. And neither the words nor history of Section 6 suggests limiting its application to "active" members.

Wieman was concerned with the denial of public employment because of *past* membership in organizations. Section 6, however, denies passports for foreign travel only to *current* members of organizations which either admit or are formally found to be substantially controlled by the foreign government or group which controls the world Communist movement, and to be primarily operating to advance the objectives of that movement. If a member were not aware of these facts before the organization's registration or the

entry of a final order directing it to do so, he is made aware of them when one or the other of these eventualities occurs. He can avoid the Act's sanctions by simply terminating in good faith his membership. There is thus no possibility of the unconscionable result against which the *Wieman* decision was aimed, viz, preclusion from legitimate employment opportunities by innocent and unknowing memberships and associations in the past. And if the member knowingly continues his membership, he is properly subject to the Act. See *Garner v. Los Angeles Board*, 341 U.S. 716; *American Communications Assn. v. Douds*, *supra*, 339 U.S. at 414.

In *Adler*, in upholding a statute denying employment in public schools to members of any organization advocating forcible overthrow of the government, the Court noted that the presumption that the members supported these objectives was not conclusive but could be rebutted. Even if the Court had held that this opportunity was constitutionally required in the circumstances of that case (which it did not), here the evidence before Congress of the danger to national security warranted denial of passports—which is a considerable milder disability than loss of employment—to all Communists having notice of the objectives of the organization and still choosing to remain members.

II

SECTION 6 DOES NOT VIOLATE THE FIRST AMENDMENT

We submit that Section 6 does not violate the First Amendment under the principles which have been laid down by this Court. Section 6 imposes no limitation

upon what any person may think or say, orally or in writing, nor does it attempt to prohibit or restrain anyone from joining or supporting any organization. Instead, Section 6 regulates only conduct—more specifically, foreign travel, which Congress has determined would threaten the security of this country. Consequently, the only limitation on any rights protected by the First Amendment results indirectly from the fact that members of the Communist Party may not travel outside the Western Hemisphere while most other Americans may do so. To paraphrase the *Adler* case, the appellants' freedom of choice between membership in the organization and travel abroad might be limited, but not their freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. 342 U.S. at 493.

Appellants argue (Br. 37) that Section 6 imposes direct restraints on their First Amendment rights because to think, speak, and write constructively requires knowledge of other countries and full communication with Communists of those countries. In other words, they contend that the curtailment of liberty of travel to foreign countries cuts off access to first-hand information necessary for the effective exercise of freedom of speech.¹¹ The decided cases hold

¹¹ Appellants also cite (Br. 45) Section 13(e), (f) of the Act, 50 U.S.C. 792 (e), (f), which provides that various policies of an organization should be considered in determining whether it comes within the Act, and Section 5 of the Communist Control Act, 50 U.S.C. 84, which states that views and writings should be considered in determining whether a person is a member of an organization to which the Subversive Activities Control Act applies. However, this Court has made clear that the factors in Section 13 are merely evidence; the crucial determinations under Section 3(3) of the Act are

unanimously, however, that liberty to travel abroad is protected by the substantive due process clause of the Fifth Amendment, not by the First Amendment. *E.g., Kent v. Dulles*, 357 U.S. 116, 129; *Shachtman v. Dulles*, 225 F. 2d 938, 941 (C.A. D.C.); *Bauer v. Acheson*, 106 F. Supp. 445, 450-451 (D. D.C.). Moreover, under appellants' argument, it would be difficult, indeed, to conceive of any activities that could not be said to provide access either to information or to a particular forum for expression of beliefs. For example, deprivation of a security clearance, it could be argued, would conflict with the First Amendment because knowledge of classified material would permit a citizen to express more ably his views about the issues of the day; refusal to permit an individual personal contact with the President or a judge or to appear before Congress would, it could be contended, directly restrict a citizen's free expression of ideas.¹⁵ In short, Section 6 imposes only indirect, peripheral restrictions on appellants' First Amendment rights.¹⁵

The fact that Section 6 does not directly regulate whether the organization is controlled by the world Communist movement and dedicated to furthering its objectives. *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 35-69; *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board*, C.A. D.C., decided December 17, 1963. The same obviously also applies to Section 5 of the Communist Control Act.

¹⁵ Consequently, such cases as *DeJonge v. Oregon*, 299 U.S. 353, *Lovell v. Griffin*, 303 U.S. 444, and *Schneider v. State*, 308 U.S. 147, upon which appellants rely (Br. 40-42), are inapposite. In those cases, this Court was concerned with legislation, or executive or judicial action, directly affecting First Amendment rights by imposing a prior restraint, by punishing individuals for publishing their views or joining an association, or by requiring adherence to a belief.

First Amendment rights does not, of course, itself justify the legislation against attack under the First Amendment. While it is one factor, and an important one, this Court still must determine whether the incidental restraint on rights protected by the First Amendment was appropriate and reasonable under all the circumstances. As this Court stated, in upholding the provision for non-Communist affidavits in the Labor Management Relations Act (*American Communications Assn. v. Douds*, *supra*, 339 U.S. at 400):

In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(b) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the delicate and difficult task * * * to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

We submit that Section 6 is constitutional under this test. Congress has found that the world Communist movement and its branches in the United States present a grave danger to American security and that the travel and use of passports by American members of such organizations is an important part of this danger. We have seen that these findings are supported by substantial evidence (see pp. 26-35 above) that travel by Communist Party members provides op-

portunity for communication of information between components of the world Communist movement, for training, for espionage and propaganda activities, and for the transmittal of American passports which may be used by Soviet agents for espionage in the United States and elsewhere. Consequently, there can be little doubt that Section 6 was reasonably designed to remedy a serious evil.

The constitutionality of Section 6 is well within the precedents of this Court. The law is filled with examples of statutes which place indirect restraints on freedom of speech or of the press, but which have nevertheless been held valid because the statute's objective lay within the power of Congress, and the restraint was a necessary and appropriate concomitant of the exercise of the power. For example, the Hatch Act validly forbids officers and employees in the executive branch of the Federal Government from taking active part in political campaigns, (Act of August 2, 1939, c. 410, § 9, 53 Stat. 1148; 5 U.S.C. 118i), notwithstanding the obvious restraints which it imposes on their freedom of speech and political expression. In *United Public Workers v. Mitchell*, 330 U.S. 75, this Court held that, in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity. The Court pointed out that it was sufficient to sustain the legislation that Congress "reasonably deemed" the "cumulative effect" of political activity by government employees as interference "with the efficiency of the public service." *Id.* at

101. The *Mitchell* case did not rest on the ground that government employment is a privilege which the government can grant or withhold on any basis. This Court's opinion expressly recognized that Congress could not constitutionally "enact a regulation providing that no Republican, Jew or Negro shall be appointed to Federal office, or that no federal employee shall attend Mass or take any active part in missionary work." *Id.* at 100.

The unfair-labor-practice provisions of the National Labor Relations Act have led to certain valid restraints on speech. *National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U.S. 469; *National Labor Relations Board v. Falk Corp.*, 308 U.S. 453. Newspaper companies are subject to regulation in the public interest, notwithstanding possible restrictive effects on their freedom to publish. *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 130-133; *Associated Press v. United States*, 326 U.S. 1, 19-20; *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193; *Lorain Journal v. United States*, 343 U.S. 143, 155-156. Radio broadcasting stations engaging in certain practices can be denied licenses without unlawfully entrenching on First Amendment rights, despite the indirect restraint on freedom of speech which may result from such denials. *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-227.

Finally, this Court stated in the *Communist Party* case in upholding the registration provisions of this same Act (367 U.S. at 96-97):

Of course, congressional power in this sphere, as in all spheres, is limited by the First Amend-

ment. Individual liberties fundamental to American institutions are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers. But where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods. Especially where Congress, in seeking to reconcile competing and urgently demanding values within our social institutions, legislates not to prohibit individuals from organizing for the effectuation of ends found to be menacing to the very existence of those institutions, but only to prescribe the conditions under which such organization is permitted, the legislative determination must be respected. *United. Public Workers v. Mitchell*, 330 U.S. 75; *American Communications Assn. v. Douds*, *supra*.

This language is fully applicable here.

The restraint on freedom of speech and association under Section 6 is significantly less than under many of the statutes involving members of the Communist Party already upheld by this Court. Section 6 does

not impose any criminal penalties for membership in the Communist Party (cf. *Dennis v. United States*, *supra*; *Scales v. United States*, *supra*), nor subject anyone to deportation (cf. *Harisiades v. Shaughnessy*, *supra*; *Galvan v. Press*, *supra*). It generally does not result in the loss of employment (cf. *American Communications Assn. v. Douds*, *supra*; *Garner v. Los Angeles Board*, *supra*). No person is even deprived of an opportunity to travel on the basis of any particular views, since an individual may entertain and express Communist beliefs and ideology and never come within the statute. Section 6 applies only when such an individual becomes a Party member, and when he thus voluntarily places himself under the discipline of a Communist organization. In such circumstances, it is reasonable to infer that because of his loyalties, interests, and discipline he is likely to engage in the harmful activities at which the statute is aimed. We submit that Congress could reasonably consider that the interest of the individual, important as it is, was outweighed by the serious danger to national security.¹⁸

¹⁸ Appellants assert (Br. 41) that Section 6 is unconstitutionally broad under the First Amendment just as they claimed that it was unconstitutionally broad under the due process clause. However, as we have seen (pp. 48-54), Congress could reasonably consider members of Communist-action organizations as a class which threatened American security. See *American Communications Assn. v. Douds*, *supra*, 339 U.S. at 392. And Congress could properly deny passports to all members of organizations who have notice that the organizations have registered or have been ordered to register when the organizations present a grave threat to national security, even though some members support the organization for entirely different and legitimate reasons. Such members choose to remain within an organization after notice of its character; they are properly chargeable with the same con-

Appellants contend (Br. 36), relying on cases involving the Smith Act, that the Board did not find that the Communist Party advocated overthrow of the government in the sense of incitement to action and that therefore Section 6 cannot constitutionally be applied. However, Congress found in Section 2(15) that Communist-action organizations present a clear and present danger; since the Board found the Party to be such an organization, it necessarily follows that the Party, together with the world Communist movement as a whole, presents a clear and present danger, and Congress can plainly protect the country from this danger. The Board was not required to repeat the finding made by Congress (see p. 43 above).

Furthermore, this Court rejected the same contention in the *Communist Party* case, 367 U.S. at 56, on the ground that the "Subversive Activities Control Act is a regulatory, not a prohibitory statute" and that therefore the decisions of this Court relating to the Smith Act are inapplicable. This holding applies both in terms and in logic to Section 6, since it, like the rest of the Act, is an attempt to regulate Communist activities in the interest of national security. Consequently, Section 6 is valid without any need to show that the Communist Party now presents a clear and present danger or that it advocates forcible overthrow in the sense of incitement.

Appellants assert (Br. 44-45) that Section 6 will necessarily be extended beyond persons who are members of Communist-action organizations. They say sequences as other members. Congress could reasonably consider that all members with notice are serving the objectives which the organization has been found to have—to carry out the aims of the world Communist movement.

that the term "membership" is vague and expansive and that, because it is unlawful for a government employee to issue a passport to an individual if he has reason to believe that he is a member of a Communist organization, the employee for self-protection will deny passports to non-members. However, there can hardly be any doubt (and appellants do not deny) that they are members of the Communist Party. Since appellants cannot raise this issue for others, it is not properly before the Court.

Moreover, membership in the Communist Party has been the controlling determination in several statutes which have been upheld by this Court. See *American Communications Assn. v. Douds*, *supra*; *Harisiades v. Shaughnessy*, *supra*; *Galvan v. Press*, *supra*; *Garner v. Los Angeles Board*, *supra*; *Killian v. United States*, 368 U.S. 231. Appellants claim that *Killian* and Section 5 of the Communist Control Act, 50 U.S.C. 844, allow consideration of numerous vague factors in determining membership. But these are merely evidentiary factors, not a definition of membership. Many factual determinations involve consideration of various different kinds of evidence. The only difference here is that Congress and this Court have made explicit statements as to what these factors are, rather than leaving the determination of membership for the fact-finder without guidance.

Moreover, there is little possibility any person will be unfairly considered as a member of a Communist-action organization when in fact he is not. Under the procedure provided by the Secretary of State, an applicant facing denial of a passport may challenge such denial, and, in such a proceeding which includes a hearing before an examiner, the right of appeal to the

Board of Passport Appeals, and review by the Secretary of State, the burden is upon the Secretary to establish, by evidence of record, reason to believe that the applicant belongs to a Communist-action organization. See 22 C.F.R. 51.138-51.170. The ultimate standard for determining membership in Communist-action organizations would, consistent with the Act, be a matter for the courts as would the application of the standard to each particular case. However, this issue is not involved here since the Secretary of State determined that the appellants were members of the Communist Party and they do not challenge this finding.¹⁷

III

SECTION 6 DOES NOT CONSTITUTE A BILL OF ATTAINDER

This Court has held that "only the clearest proof could suffice to establish the unconstitutionality of a statute on" on the ground of a bill of attainder. *Flemming v. Nestor*, 363 U.S. 603, 617; *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 83. Here, on the contrary, Section 6 plainly is not such a statute for three reasons.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial on named individuals or on easily ascertainable members of a group for

¹⁷ Appellants also argue (Br. 43-44) that there is no reason in terms of national security for the denial of passports, as Section 6 requires, to members of Communist-front, as contrasted to Communist-action, organizations. The short answer is that this issue is not presented in this case since appellants have been found to be members of a Communist-action organization, and they do not challenge this finding.

past conduct. *Cummings v. Missouri*, 4 Wall. 277, 323; *Ex parte Garland*, 4 Wall. 333, 377; *United States v. Lovett*, 328 U.S. 303, 315-317; *American Communications Assn. v. Douds*, 339 U.S. 382, 413-414; *Garner v. Los Angeles Board*, 341 U.S. 716, 722.

First, neither the appellants nor even the Communist Party was named in the Act. This Court held in the *Communist Party* case, 367 U.S. at 86-88, that the registration provisions of the Act did not constitute a bill of attainder as to the Communist Party, because Congress did not prescribe that the Party was subject to the Act. Instead, Congress required that any organization meeting certain criteria must register, and the Board found that the Party satisfied these criteria. Since Section 6 is based directly on the registration provision, it equally cannot be a bill of attainder.

Second, Section 6 is not a penal statute. As this Court expressly held in the *Communist Party* case, 367 U.S. at 83-86, and Section 2 of the Act makes clear, Congress intended in the Act to accomplish the legitimate governmental purpose of checking the serious worldwide Communist danger insofar as it was working through organizations within the United States. And as we have shown, the restriction in Section 6 is reasonably related to this objective.

Third, the sanctions in Section 6 have no retroactive affect; they apply only to persons who remain members of Communist organizations after they have registered or been ordered to register under the Act and are still members at the time they apply for or attempt to use a passport. *Bona fide* termination of membership by a particular individual precludes the

application of Section 6 to him from that time on. *Communist Party v. Subversive Activities Control Board, supra*, 367 U.S. at 88.

IV

SECTION 6 DOES NOT VIOLATE PROCEDURAL DUE PROCESS

Appellants contend (Br. 48-52) that Section 6 violates procedural due process because "it makes the 1953 finding of the [Subversive Activities Control] Board that the Communist Party was a Communist-action organization conclusive upon appellants as to the present character of the Party." We submit that this contention is clearly without merit.¹⁸

The Subversive Activities Control Act establishes specific procedures for determining which organizations fall within the class of organizations required to register. These procedures involve full hearings before an expert administrative tribunal and judicial re-

¹⁸ Appellants suggest (Br. 49) that Section 6(a) requires that, in a prosecution for applying for or use of a passport, the government must relitigate the Board's determination that the organization to which the defendant belongs is a Communist-action organization. Consequently, their argument as to procedural due process is limited to Section 6(b), which they claim allows a government employee to be prosecuted for giving a member of a Communist-action organization a passport without any need to relitigate whether it is such an organization. However, Section 6(a) explicitly makes it a criminal offense for any person who is a member of an organization to apply for or use a passport when "there is in effect a final order of the Board requiring such organization to register * * * ." Since Section 6 does not require, or indeed allow, relitigation of the proceeding before the Board for any prosecution under it, we consider appellants' argument as involving all of Section 6.

view of its determinations. The tortuous history of the original determination (see the *Communist Party* case, 367 U.S. at 19-22) demonstrates the total impracticability of allowing each Party member to relitigate this requirement before he can be denied a passport. Beyond this, the Communist Party may fairly be said to have represented its members—and particularly its leaders such as appellants—in the litigation resulting in the final order to register. As this Court stated in *Hansberry v. Lee*, 311 U.S. 32, 42-43, "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present * * *, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." Accord, *Restatement, Judgments* (1942), § 86. Thus, a stockholder is bound by a judgment in which the corporation was a party on the ground that "as stockholder he has voluntarily assumed a corporate relationship which is subject to the local regulatory power, in the exercise of which the procedure has been attached, as an incident to his membership in the corporation * * * . [T]he benefits of membership carry with them the risk that the corporation may stand in judgment for him." *Christopher v. Brusselback*, 302 U.S. 500, 504, and the cases therein cited. Similarly, here, the members of the Party voluntarily either began or continued membership in the

Party after notice that it was subject to the Act, and therefore they are bound by the judgment determining the character of the organization to which they belong. Regardless of the rule in the absence of statute, at the least, Congress' determination to have the organization litigate the applicability of the Act for all its members is not so unfair as to violate due process. See *Communist Party v. Subversive Activities Control Board*, 223 F. 2d 531 (C.A. D.C.), reversed on other grounds, 351 U.S. 115.

Appellants contend that, regardless of the original validity of the 1953 order, it has become stale over the past decade. We submit, however, that Congress may validly provide that, if an organization is found to come within a statute, the statute shall apply indefinitely. The non-Communist affidavit provision in the Labor Management Relations Act applied specifically to all members of the Communist Party. This Court upheld its constitutionality despite the fact that only Congress could remove the Party from the provisions of the statute. *American Communications Assn. v. Douds*, *supra*. Similarly, Congress could reasonably decide that all organizations which are found to satisfy the standards of the Subversive Activities Control Act and which refuse to register should continue under the disabilities of the Act because the Communist movement is a grave danger to national security and because its operations are extremely difficult to trace because of its secret and conspiratorial nature. In view of those circumstances, it was not unreasonable to require any members to form a new organization if they desire to disassociate them-

selves from control by the world Communist movement and from primarily pursuing its objectives. This is a familiar step in such relatively unimportant areas as the disestablishment of company-dominated labor organizations. *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 270-271; *National Labor Relations Board v. Newport News Shipbuilding Co.*, 308 U.S. 241, 250-251; *National Labor Relations Board v. Link-Belt Co.*, 311 U.S. 584, 597-600.

In any event, Congress has provided a means by which an organization can relitigate its status under the Act. Section 13(b) allows an organization registered under the Act to apply to the Attorney General as often as once a year to cancel its registration and, if he refuses, the organization "may petition the Board for a redetermination of its amenability to the registration requirements of the Act, pursuant to a hearing which, again, is subject to judicial review."¹⁹ *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 87. Consequently, "[f]ar from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuingly contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a prescribed character." *Ibid.* As this Court stated in the *Communist Party* case, 367 U.S. at 87, the Act offers "adequate means of re-

¹⁹ Individuals may also ask the Board to cancel their registration under Section 13(b). However, they can litigate only the issues involved in requiring them to register—i.e., whether they are members of an organization which has been ordered to register under Section 7.

lief" "[i]f the Party should at any time choose to abandon" the activities which made it subject to the Act. Since Section 6 applies only when the registration provisions do, this holding equally applies to the present case.

Appellants state (Br. 51), however, that Section 13 is not available to the Party because it has refused to register. This, however, was the Party's free choice. But even if Congress is constitutionally required to provide the Party a means to relitigate the 1953 determination and Section 13 is inadequate in that it is confined to organizations which have registered, it is the Party which was denied a constitutional right. The Party could then establish this right by bringing an action challenging the present applicability of the Act. Individual members of the Communist Party could not challenge the original determination of the Board concerning the character of the Party and the applicability of the Act (see pp. 66-68 above). Equally, the members are bound by the Party's decision not to challenge the 1953 decision on the ground of staleness.²⁰ Meanwhile, Party members may escape the effect of the Board's 1953 determination by simply resigning from the Party. By deciding to remain within the Party, they assume the disabilities which Congress has imposed on all members of organizations which have been determined to come within the Act. Putting them to the choice is not unreasonable when the national security is at stake.

²⁰ If the Party fails to relitigate the issue, it is possible that members may have a cause of action to compel the party to give them adequate representation.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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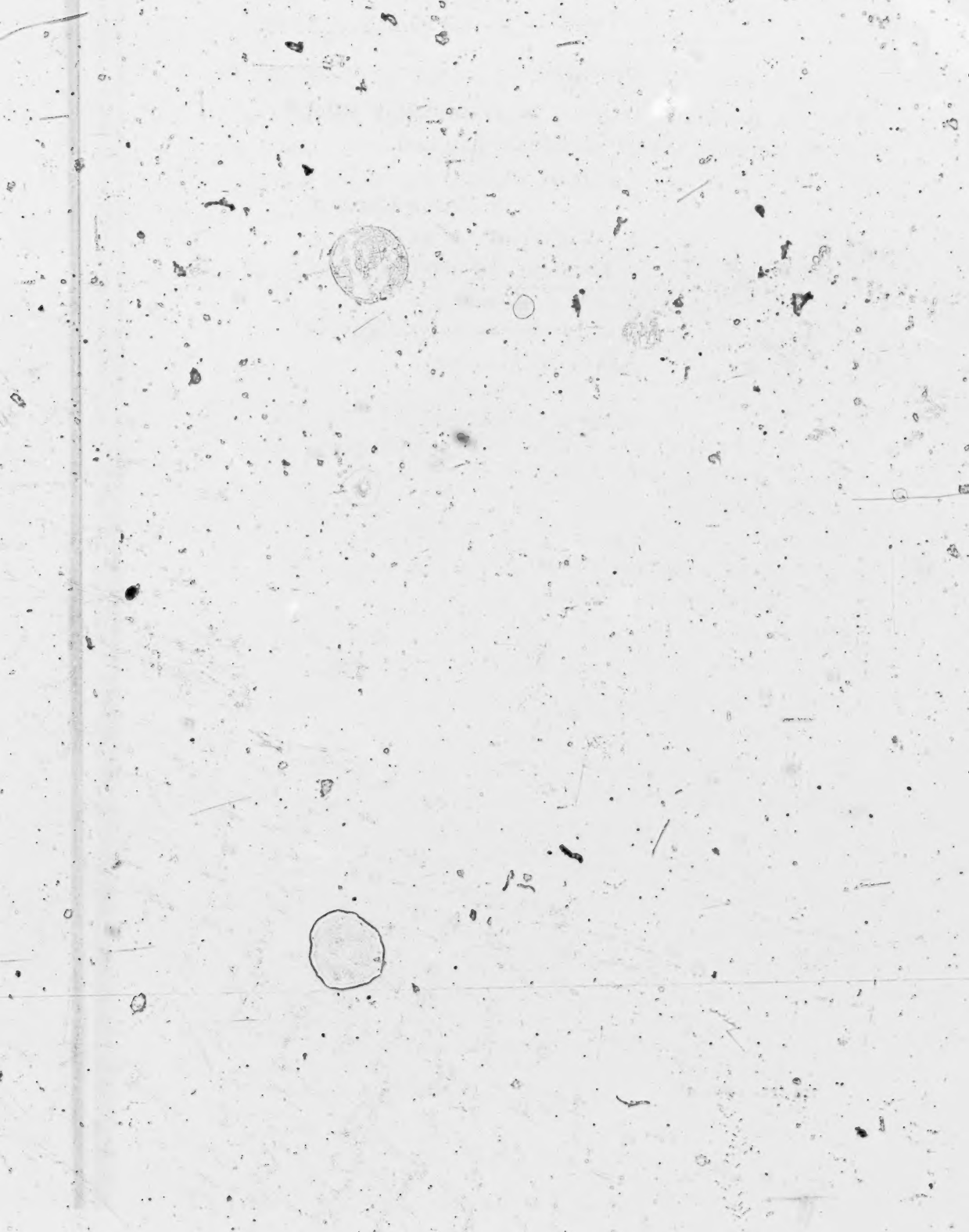
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MARCH 1964.



APPENDIX A

The Department of State's Passport Regulations, 22 C.F.R. 51.135-51.170, are as follows:

§ 51.135 Denial of passports to members of Communist organizations.

A passport shall not be issued to, or renewed for, any individual who the issuing officer knows or has reason to believe is a member of a Communist organization registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950 as amended. (50 U.S.C., sec. 786.)

§ 51.136 Limitations on issuance of passports to certain other persons.

In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, shall be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.

§ 51.137 Tentative denial of passports and available administrative procedures.

Any person whose application for a passport or renewal of a passport has been tentatively denied under § 51.135 or § 51.136 shall be entitled to a notification in writing of the tentative denial. The notification shall set forth clearly and concisely the specific reasons for the denial and the procedures for review available to the applicant.

§ 51.138 Procedure for review of tentative denial.

(a) A person whose application for a passport or renewal of a passport has been tentatively denied in accordance with § 51.135 or § 51.136 shall be entitled, upon request, and before the denial becomes final, to present to the Passport Office any information he deems relevant to support his application. He shall be entitled to appear in person before a Hearing Officer in the Passport Office; to be represented by counsel; to present evidence; to be informed of the evidence upon which the Passport Office relied as a basis for the tentative denial; to be informed of the source of such evidence; and to confront and cross-examine adverse witnesses.

(b) The applicant shall, upon request by the Hearing Officer, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Office shall review the record and advise the applicant of its decision. In making its decision, the Passport Office shall not take into consideration confidential security information that is not made available to the applicant in accordance with paragraph (a) of this section. If the decision is adverse to the applicant, he shall be notified in writing, and the notification shall state the reasons for the decision. Such notification shall also inform the applicant of his right to appeal to the Board of Passport Appeals under § 51.139.

§ 51.139 Appeal by passport applicant.

In the event of a decision adverse to the applicant, he shall be entitled within thirty days after receipt of notice of such decision to appeal his case to the Board of Passport Appeals provided for in § 51.150.

§ 51.150 Creation and functions of Board of Passport Appeals.

There is hereby established within the Department of State a Board of Passport Appeals hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.139. The Board shall adopt and make public rules of procedure to be approved by the Secretary.

§ 51.151 Organization of Board.

The Board of Passport Appeals shall consist of three or more members designated by the Secretary of State, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152 Chairman.

The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and to pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.153 Counsel to the Board.

A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the schedule and presentation of cases; for assistance in legal and procedural matters; for providing information to the applicant as to his procedural rights before the Board; for maintenance of records; and for such other duties as the Board, or the Chairman on its behalf, may determine.

§ 51.154 Examiner.

The Board may, in its discretion, appoint an examiner in any case, who may, with respect to such case be vested with any or all authority vested in the Board or the Chairman, subject to review and final decision by the Board, but an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155 Duty of Board to advise Secretary of State on action for disposition of appealed cases.

It shall be the duty of the Board, on the basis of the evidence on the record, to advise the Secretary of the action it finds necessary and proper to the disposition of the cases appealed to it, and to this end the Board may first call for clarification of the record, make further investigation; or take other action consistent with its duties.

§ 51.156 Basis for findings of fact by the Board.

In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.154 shall be convinced by a preponderance of the evidence, as would a trial court in a civil case. In determining whether there is a preponderance of evidence supporting the denial of a passport, the Board shall consider the entire record before it. The Board shall not take into consideration any confidential security information which is not part of the record.

§ 51.157 Decisions of the Board.

Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.155 which shall be in closed session. Decisions under § 51.155 shall be in writing and shall be

signed by all participating members of the Board.

§ 51.158 Delivery of papers.

Appeals or other papers for the attention of the Board may be delivered personally, by registered mail, or by leaving a copy at the office of the Board at the address to be stated in the notification of adverse decision furnished to the applicant by the Passport Office.

§ 51.159 Notice of hearing.

An applicant shall receive not less than five business days notice in writing of the scheduled date and place of hearing, which shall be set for a time as soon as possible after receipt by the Board of the applicant's appeal.

§ 51.160 Appearance.

Any party to any proceeding before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161 Applicant's attorney.

(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties, appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of

the applicant's activities relevant to a determination of the case.

§ 51.162 Hearings.

The record of proceedings held under § 51.138 shall be made available to the applicant in connection with his appeal to the Board. The applicant may appear and testify in his own behalf, be represented by counsel, present witnesses and offer other evidence in his own behalf. The Passport Office may also present witnesses and offer other evidence. The applicant and witnesses may be examined by any member of the Board or by counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such deposition may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths and affirmations for purposes of the depositions. The applicant shall be entitled to be informed of all the evidence before the Board and of the source of such evidence, and shall be entitled to confront and cross-examine any adverse witness.

§ 51.163 Admissibility.

The Passport Office and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency and materiality of evidence presented.

§ 51.164 Privacy of hearings.

Hearings shall be private. There shall be present at the hearing only the applicant, his counsel, the members of the Board, Board's Counsel, official stenographers, Departmental

employees and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony, or when otherwise directed by the Board.

§ 51.165 Misbehavior before Board.

If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, an attorney guilty of misbehavior may be excluded from participation in any other case before the Board.

§ 51.166 Transcript of hearings.

A complete verbatim stenographic transcript shall be made of the hearing by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant or his counsel shall have the right to inspect the complete transcript, and to purchase a copy thereof.

§ 51.167 Notice of decision.

The Board shall communicate to the Secretary of State the action that it recommends under § 51.155. In taking action upon such recommendation of the Board the Secretary shall not take into consideration any confidential security information which is not part of the record. The decision of the Secretary shall be promptly communicated in writing to the applicant.

GENERAL APPLICABILITY OF REVIEW AND APPEAL
PROCEDURES

§ 51.170 Applicability of §§ 51.138-51.167.

Except for action taken by reason of non-citizenship or geographical limitations of general applicability necessitated by foreign policy

considerations, the provision of §§ 51.135 to 51.167 shall apply in any case where the person affected takes issue with the action of the Secretary in refusing, restricting, withdrawing, canceling, revoking, or in any other fashion or degree affecting the ability of such person to receive or use a passport.

APPENDIX B

EXCERPTS FROM THE REPORT OF THE COMMISSION ON GOVERNMENT SECURITY (1957) (PAGES 470-475)

PASSPORT SECURITY PROGRAM

RECOMMENDATIONS

Necessity

A passport security program is necessary to deter travel abroad by subversives bent on missions detrimental to the United States and to narrow as much as possible the sphere of Soviet international conspiratorial activity in the fields of espionage and propaganda.

Abundant evidence exists to support this finding. There is a long history of insidious use of travel documents, not only in the United States but in other nations of the free world, to further the Communist objective of world domination.

The passport is an important instrument in support of the recognized Communist technique of communication by personal contact. It has been employed over the years to insure the presence of American Communists and Americans under Communist discipline at Soviet centers for indoctrination and training, including the Lenin School in Moscow. It has been utilized by Communist sympathizers as a vehicle for their attendance at and participation in activities of international Communist propaganda organizations. It has been a device for the movement of Soviet agents and spies into and out of the United States and other free nations of the world.

The Internal Security Act of 1950, prohibiting the issuance of passports to members of Communist organizations registered or required to be registered by the Subversive Activities Control Board, enunciated the statutory necessity for travel restrictions in the following language:

"Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."¹

In retrospect, the Internal Security Act of 1950 can be viewed as a crystallizing force that terminated fluctuations of State Department passport policies and procedures prevalent for years:

These fluctuations are reviewed in the following excerpts from one of the State Department's own documents:

"Shortly after the Bolshevik Revolution of 1917 this Government became aware of the scope and danger of the worldwide revolutionary movement and the attendant purpose to overthrow all existing governments, including our own. As a countermeasure passports were refused to American Communists who desired to go abroad for indoctrination, instruction, etc. This policy was continued until 1931 when Secretary Stimson reversed the previous rulings. Thereafter until World War II no persons were refused passports because they were Communists.

¹ 50 U.S.C. sec. 781.

"After the termination of hostilities and the return of travel to more normal conditions, the question came up as to whether the Department would issue regular passports to individuals if they were Communists. At first passports were refused, but the matter was reconsidered at the highest level of the Department in early 1948 and the decision was made that passports would be issued to Communists and supporters of communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities. At the same time the decision was made that passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States. Later in the same year the policy was modified to permit the issue of passports to Communist journalists even though they were actively promoting the Communist cause. In September 1950 the Passport Division raised the question, in connection with pending passport applications by Communistic journalists, whether this policy should be modified. It was pointed out that ten members of the National Committee of the Communist Party had been convicted of violating the Smith Act; that the Communists were actively supporting the enemy position in the Korean war, and that the Internal Security Act of 1950 clearly showed the desire of Congress that no Communists should be issued passports of this Government.

"The Department also took into consideration its own experience that ever since the end of World War I, American Communists and alien Communists illegally in possession of American passports had effectively carried on abroad espionage, propaganda and revolutionary activities on behalf of the Soviet Government and the international Communist movement

and contrary to the foreign policy of the United States Government. The matter was referred to the Legal Adviser who agreed that it was the duty of the State Department to refuse passports to all Communists, including journalists."²

In the operation of its espionage apparatus in the United States, the Soviet Government has frequently interchanged its agents in Canada, Mexico, and this country, using fraudulent passports in the process.³

Here in the United States, false naturalization and birth certificates have been employed in making applications for passports. False names have been used. Identities of other persons, many of them long since dead, have been assumed. Birth certificates of living persons have been bought, and there have been instances where municipal officials have been paid to record births and issue certificates for persons who never existed.⁴

* * * * *

Since the Spanish Civil War there has been a great increase in the number of applicants concealing their true destination and purpose of travel.

During the Spanish war, between 2,000 and 3,000 Americans, who obtained passports for travel to some other country, went to Spain and joined the international brigade although their passports were stamped "not valid for travel to Spain." These Americans were required to turn over their passports to the headquarters of the international brigade in Albacete,

² Refusal of passports to Communists, State Department memorandum, May 29, 1956, pp. 1, 2.

³ The Shameful Years, Thirty Years of Soviet Espionage in the United States, H. Rept. 1229, 84th Cong., 2d sess., p. 4.

⁴ Senate Internal Security Subcommittee hearings on "Scope of Soviet activity in the United States," pt. 27, app. I, pp. 1497 and 1498.

Spain, "for safekeeping." Most of these passports eventually wound up in Moscow for alteration and possible use by Soviet agents. The United States, as a countermeasure, then replaced every outstanding passport in the world with a new-type document to prevent use of the old ones by Soviet agents.⁵

American supporters of international Communism have frequently certified that their trips abroad for business or pleasure contemplated visits only to certain designated countries. Upon arrival overseas, however, they have breached the restrictions stated in their passports and have passed through the Iron Curtain to become officials, delegates, and observers at conferences of Soviet-dominated propaganda organizations that have spawned infamous denunciations of the United States. Their passports, except for a few isolated instances, do not reflect entry or exit visas evidencing travel behind the Iron Curtain. These have been stamped on a slip of paper which was removed from their possession at the time of their return to the free world.⁶ The detached visa device to conceal the fact of visits to the Soviet Union from agencies of the United States Government is known to have existed as far back as 1927.⁷

The Communist-inspired Asian and Pacific peace conference in Peking, China, in October 1952, which was attended by 15 American delegates, is a typical example of concealment.

⁵ Pt. 23, hearings on scope of Soviet activity in the United States, Internal Security Subcommittee, Committee on the Judiciary, U.S. Senate, May 9-10, 1956, p. 1220-1222.

⁶ H. Rept. 53, 85th Cong., 1st sess., annual report of Committee on Un-American Activities for the year 1956, p. 14.

⁷ Report of the Subversive Activities Control Board (*Brownell v. Communist Party of the United States of America*), S. Doc. 41, 83d Cong., 1st sess., p. 106.

Henry Willcox and his wife, Anita, of Long Island and Connecticut, despite their records of Communist sympathy, secured passports ostensibly to visit France and Turkey for business. Their passports carried the prevailing restriction against travel behind the Iron Curtain, but they showed up in Moscow and boarded a plane that took them to Peking, where Mrs. Willcox read a speech to the conference and Willcox served as vice chairman of the American delegation.

* * * *

The committee [i.e., House Committee on Un-American Activities] also called several of the American delegates to the World Youth Festival held in Warsaw in 1955. All had concealed their purpose of travel, they were found to have been affiliated with the Communist Party and they refused to answer questions about their passport applications, their travel abroad, and their conduct at the conference.*

Of 1,905,152 applications received from September 1, 1952, to August 1, 1956, the Passport Office tentatively denied 275 for security reasons. There were final denials in 29 security cases by the Passport Office from January 4, 1954, to July 31, 1955, and none from August 1, 1955, to August 1, 1956. Final denials by the Secretary of State for 1955 for security reasons totaled 13. However, some indication of the deterrent effect of the program can be deduced from the figures showing that 54 passports were not issued between January 1, 1956, and August 1, 1956, "because of failure or refusal of applicant to execute affidavits" demanded by the Passport Office.*

* * * *

* H. Rept. 53, 85th Cong., 1st sess., annual report of Committee on Un-American Activities for the year 1956, pp. 15, 16.

* Passport Office response to Commission on Government Security interrogatory, Oct. 3, 1956.

For the reasons specified, we must conclude that a passport security program is a necessity and should be continued subject to changes and modifications delineated with more particularity hereinafter in this report.

APPENDIX C

1. THE HISTORICAL BACKGROUND OF THE SUBVERSIVE ACTIVITIES CONTROL ACT

We give a brief review of the Act's historical setting in the hope that it will assist the Court in its task of weighing the merits of appellants' arguments. Just as an examination of the problem or evil which evoked the passage of legislation is a sound guide to its purposes and meaning (*Holy Trinity Church v. United States*, 143 U.S. 457, 463-465; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489-493), so too a fair appreciation of the nature of the problem which led to the enactment of a statute is indispensable to proper evaluation of the soundness of challenges to its constitutionality. Cf. *American Communications Assn. v. Douds*, 339 U.S. 382, 388-389; *Dennis v. United States*, 341 U.S. 494, 562-566 (Mr. Justice Jackson, concurring). Rarely has there been a more intense study of methods of dealing with a particular evil than that which preceded and produced the Subversive Activities Control Act of 1950.¹⁰

Following World War I, the powerful totalitarian political movements of Communism, National Socialism, and Fascism developed in Russia, Germany,

¹⁰ There is a more detailed discussion of much of this material in the Government's brief in this Court in *Dennis v. United States*, Oct. Term, 1950, No. 336, pp. 174. *et seq.*

and Italy. The success of the so-called Fifth-Column groups in Europe during the 1930's indicated the vulnerability of republican forms of government to conspiracies guided from outside the country involved, ready to seize total power by illegal means as soon as the time became propitious. See Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 Colum. L. Rev. 591-622, 725-744 (1938). By 1940 it was clear that these highly organized and disciplined totalitarian movements, financed and directed from abroad and promoted domestically by secret dedicated action-groups, involved much greater danger to the democracies than had earlier individual exponents of political violence. The danger became one, not of ideas and philosophies but of external aggression aided by local groups serving the aggressive aims of their foreign principals.

As early as 1930, investigations were conducted by Congressional committees into Communist propaganda and activities in the United States and considerable testimony directed to this issue was adduced in various cities of the United States. See *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong., 1st Sess., pp. 216-217 (1953). In 1934, the investigation was extended to Nazi propaganda activities. *Id.* at 217-218. During the years 1930-1940, it was shown that the alien political philosophies of the right and left had created divided loyalties in this country. For example, William Z. Foster, the leader of the Communist Party of the United States, testified in 1931 that the "more advanced workers" in this country "look upon the Soviet Union as their country." Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R., 71st Cong., 2d Sess., Part I, vol. 4, p. 384.

During the 1939 hearings before the House Committee on Un-American Activities, the testimony of such witnesses as Benjamin Gitlow and Earl Browder, as well as a mass of documentary evidence, tended to show the subservience of the American Communist Party to the Soviet Union. Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, *passim*. Among the documents before the Committee was the *Theses, Statutes, and Conditions of Admission to the Third (Communist) International*, adopted at the Second World Congress of the Communist International in 1920. *Id.*, vol. 7, pp. 4668-4671. Among the "conditions" which a party aspiring to join the International was required to accept were: willingness to combine illegal with legal work to advance the objective of a world proletarian dictatorship (condition 3); willingness to infiltrate and carry on propaganda and agitation in military organizations (condition 4); renunciation of "social patriotism," and systematic demonstration to the working class of the necessity of a "revolutionary overthrow of capitalism" (condition 6); recognition of the necessity of "complete and absolute rupture with reformism and the policy of the centrists" (condition 7); willingness to carry on "systematic and persistent Communist work in the labor unions" and to form "Communist nuclei" within unions to the end that they should be "[won] over * * * to Communism" (condition 9); willingness to remove all unreliable elements from "the personnel of their parliamentary factions" and to ensure the subjection of such personnel to the "Central Committee of the party" (condition 11); the maintenance of "iron discipline" on the basis of the "principle of democratic centralization" to the end that the "party centre" may

enjoy "the confidence of the party membership" and be "endowed with complete power" over it (condition 12); willingness to "render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces" and to carry on "propaganda to induce the workers to refuse to transport any kind of military equipment intended for fighting against the Soviet Republics" (condition 14); recognition of the "binding" force of all resolutions of congresses of the Communist International and of its Executive Committee on "all parties joining the Communist International" (condition 16); and exclusion from the party of all members who "reject in principle the conditions and theses" (condition 21).

Congress was informed that these "conditions" governed the relationship between the American Communist Party and the International. Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4308-4311, 4667-4668. For example, in 1929, the Executive Committee of the International, under the personal leadership of Stalin and Molotov, decided upon and enforced the replacement of the Lovestone-Gitlow leadership of the American Party by that of Foster and Browder. When Lovestone and Gitlow defied the Executive Committee, Stalin made a speech reminding them of the fate of Trotsky and Zinoviev (*id.* at 4432),¹¹ and the Party's organ, the *Daily Worker*, stated editorially on June 1, 1929, that (*id.* at 4671):

* * * Comrades Lovestone and Gitlow in their declaration of May 14 refused to accept

¹¹ The full text of this speech is set forth in the Appendix to the *Hearings before a Special Committee to Investigate Communist Activities in the United States*, H.R., 71st Cong., 2d Sess., Part I, pp. 876-882.

the address or to carry it out, and even went to the length of stating that they would actively oppose it. They are thus entering upon a course leading toward an attempt to split the party, a course in violation of the 21 conditions and the statutes of the Comintern.

Thus, by 1939, there was a mass of oral and documentary evidence collected by the House Committee on Un-American Activities over the previous nine years, from which it could be concluded that both the Communist International and the Communist Party of the United States were devoted to the establishment of a proletarian dictatorship by force and violence, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. See *Internal Security Manual*, Sen. Doc. No. 126, 86th Cong., 2d Sess., pp. 376-398 (a synopsis of the many hearings held by Congressional Committees investigating subversive activities from 1930 to 1960); see also H. Rep. No. 153, 74th Cong., 1st Sess., p. 21.

Congress endeavored to deal with this problem in several ways. In the portion of the Alien Registration Act of 1940, c. 439, 54 Stat. 670, known as the Smith Act—i.e., Sections 2, 3, and 5 (now consolidated in 18 U.S.C. 2385)—it was made a criminal offense to advocate the overthrow of the government by force and violence or to conspire so to advocate.¹² The problem of the dissemination of foreign propaganda was approached by the method of disclosure. In 1938, Congress enacted the Foreign Agents Registra-

¹² The constitutionality of the conspiracy and membership provisions were upheld in *Dennis v. United States*, 341 U.S. 494, and *Scales v. United States*, 367 U.S. 203.

tion Act, c. 327, 52 Stat. 631, 22 U.S.C. 611-621, requiring the registration of any individual or organization acting as the domestic agent of a foreign principal and requiring information as to the identity of the principal and the terms of the contract. The committee reports on the bill which became that Act both stated (H. Rept. No. 1381, 75th Cong., 1st Sess., pp. 1-2; S. Rept. No. 1783, 75th Cong., 3d Sess., pp. 1-2):

This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.

As a result of difficulties in enforcing the Foreign Agents Registration Act, on October 17, 1940, Congress passed the so-called Voorhis Act, c. 897, 54 Stat. 1201 (now 18 U.S.C. 2386), requiring the registration, *inter alia*, of any organization "subject to foreign control which engages in political activity." The House Committee on the Judiciary, in its report on the bill which became the Voorhis Act, said with respect to the purposes of the bill (H. Rept. No. 2582, 76th Cong., 3d Sess., p. 1):

Freedom of political expression is a fundamental principle of democracy. A serious problem arises, however, where political organizations exist in a democracy which are substantially controlled or directed by a foreign power and seek to pursue a policy in a democracy like the United States for the benefit of that foreign power.

* * * *

The principle upon which this bill is based is that there is no place in a democracy for

undercover political organizations. Without in any way interfering with freedom of political activity, the passage of this legislation would mean that it would be unlawful for any political activities, inimical to the constitutional government, to be carried on, unless the full facts concerning such activities are made known.

It soon became apparent that there were also difficulties in the enforcement of the Voorhis Act. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107, 122-133. While it was originally anticipated that both the Communist Party and the German-American Bund would have to register under the Act (H. Rept. No. 2582, 76th Cong., 3d Sess., p. 2), the restricted meanings given to the terms "subject to foreign control" and "political activity" by the Act itself made avoidance of registration possible through the device of a claimed divorce. For example, the Communist Party, at its 1940 convention, adopted a resolution which provided, *inter alia* (Record of Communist Party v. Subversive Activities Control Board, No. 12, October Term, 1960, C.P. Ex. 13, p. 15):

That the Communist Party of the U.S.A., in Convention assembled, does hereby cancel and dissolve its organizational affiliation to the Communist International, as well as any and all other bodies of any kind outside the boundaries of the United States of America, for the specific purpose of removing itself from the terms of the so-called Voorhis Act, which originated in the House of Representatives as H.R. 10094, which has been enacted and goes into effect in January 1941, which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a legal and open political party of the American working class * * *

In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the real objectives of domestic organizations believed to be subversive but which veiled their true end behind a facade of respectability. That Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and which constituted a real threat to the security of the United States. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 Ill. (Northwestern Univ.) L. Rev. 193, 204-205 (1942); Cohen and Fuchs, *Communism's Challenge and the Constitution*, 34 Corn. L. Q. 182, 201 (1948); Moore, *The Communist Party of the USA: An Analysis of a Social Movement*, 39 Am. Pol. Sci. Rev. 31, 36-37 (1945).

After the cessation of hostilities in World War II, events occurred and facts were uncovered which tended to show more clearly the nature and dimensions of the danger. Communist regimes were established in several countries other than the Soviet Union, and elsewhere Communist parties attained considerable strength. The methods by which these regimes seized power—for example, in Czechoslovakia—were not unknown or unnoted in this country.¹³ Moreover, there came to light direct evidence of espionage. The revelations of Igor Gouzenko, a clerk on the staff of Colonel Zabotin, Soviet Military Attaché in Canada, led to the establishment of a Royal Commission in Canada to investigate espionage activities being con-

¹³ The details of this history are set forth in the Government's brief in *Dennis v. United States*, No. 336, Oct. Term, 1950, pp. 199-203.

ducted through that office. After hearing the testimony of many witnesses and considering a mass of documentary materials, the Commission concluded in a thorough report that the Soviet Union, acting through Canadian Communists, was attempting to infiltrate every sensitive agency of the Canadian government and its defense establishments and had to a great extent succeeded. *Report of the Royal Commission To Investigate the Facts Relating to and the Circumstances Surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power* (1946). The Report revealed that local agents, trained in Fifth-Column methods, passed information to Soviet officers within the Embassy, who were frequently members of the N.K.V.D. (Soviet secret police) in direct communication with Moscow. *Id.* at 11-13. It was found from documents emanating from the Soviet Embassy that the Communist International, or Comintern, the dissolution of which had been announced in Moscow in 1943, continued to exist and to be active in espionage work on this continent. *Id.* at 37-41. The Report quoted a statement by Gouzenko that (*id.* at 37):

The announcement of the dissolution of the Comintern was probably the greatest farce of the Communists in recent years. Only the name was liquidated, with the object of reassuring public opinion in the democratic countries. Actually the Comintern exists and continues its work * * *.

"The documents which Gouzenko brought with him," the Royal Commission commented, "corroborate this testimony." *Ibid.*

The Commission found that the main recruiting ground for espionage agents was the illegally con-

stituted Communist Party of Canada. The Communist cells, which posed as study groups, were the contact points for the agents. *Id.* at 44-48, 69-83. Often a particular Communist agent would be selected for Colonel Zabotin's group on orders directly from Moscow. *Id.* at 44-48. It was shown by documentary evidence that the national organizer for the Communist Party of Canada was instructed in 1945 to recruit espionage agents in the defense establishments of the Canadian government. *Id.* at 48-49, 97. Money to pay for espionage services was paid to some of the Canadian agents by the Soviet Embassy. *Id.* at 59-68.¹⁴

In England, the scientist Klaus Fuchs, a Communist, confessed to espionage of the gravest character against the United Kingdom and the United States. See the New York Times, February 11, 1950, p. 2.

Investigations in the United States by Congressional agencies led to similar conclusions. See *The Shameful Years: Thirty Years of Soviet Espionage in the United States*, H. Rept. No. 1229, 82d Cong., 2d Sess. It was found that the Soviet Union established organizations in the United States ostensibly for commercial purposes, but actually to act as a funnel for intelligence work. *Id.* at 5-7, 15. Testimony by former Communist agents showed that Communist

¹⁴ Legal proceedings against some of the persons mentioned in the Report of the Royal Commission are reflected in *Rose v. The King*, 3 [1947] D.L.R. 618, 88 Can. Cr. Cas. 114; *Boyer v. The King*, 94 Can. Cr. Cas. 195 (1948); *Rex v. Mazerall*, 4 [1946] D.L.R. 791, [1946] Ont. Rep. 762; *Rex v. Lunan*, 3 [1947] D.L.R. 710, [1947] Ont. Rep. 201; *Rex v. Harris*, [1947] Ont. Rep. 461; *Rex v. Smith*, [1947] Ont. Rep. 378; *Rex v. Gerson*, [1947] Ont. Rep. 715.

espionage groups had successfully infiltrated certain strategic areas of the government and maintained liaison with Soviet Embassy officials. See *Interlocking Subversion in Government Departments* (Report of the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Senate Committee on the Judiciary, 83d Cong., 1st Sess., dated July 30, 1953); see also *United States v. Hiss*, 185 F. 2d 822, 829 (C.A. 2), certiorari denied, 340 U.S. 948. Espionage agents were believed to have obtained highly confidential data regarding nuclear experiments in progress at the radiation laboratories of the University of California, and regarding atomic energy experiments in a laboratory at Columbia University at an early stage. *The Shameful Years, etc., supra*, pp. 31, 35.

In 1949, after a protracted trial, Eugene Dennis and ten other leaders of the Communist Party were found guilty of violating the Smith Act, and the evidence produced at the trial furnished further proof of the attitudes and actions of the Party's top ranks, and their relationship to the Soviet Union. The convictions were affirmed, with an exhaustive opinion by Judge Learned Hand, on August 1, 1950 (183 F. 2d 201 (C.A. 2)), slightly less than two months before the final enactment of the Act involved here. This Court later affirmed the Second Circuit (341 U.S. 494), without finding it necessary to review the sufficiency of the evidence.

Armed warfare began in Korea in June 1950.

Thus, Congress had reason to believe, in September 1950, that there remained in existence a world Communist movement which endangered the security of the United States. This was the problem with which

Congress undertook to deal in the Subversive Activities Control Act¹⁵ of 1950.

2. THE FINDINGS MADE BY CONGRESS IN THE ACT

The Subversive Activities Control Act was the final distillate, after more than two years of study, of a number of different bills. H.R. 5852, 80th Cong., 2d Sess., was introduced in the House and referred to the Committee on Un-American Activities on March 15, 1948: 94 Cong. Rec. 2893. In its report on the bill, the Committee on Un-American Activities cited the fact that the Foreign Agents Registration Act of 1938 and the Voorhis Act of 1940, while "directed against both Nazis and Communists," had "proved ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties." H. Rept. No. 1844, 80th Cong., 2d Sess., p. 5. It was also stated that, while the Alien Registration Act of 1940—i.e., the Smith Act—made it a crime to advocate the overthrow of the government of the United States by force and violence, and "[w]hile force and violence is without doubt a basic principle to which all Communist Party members subscribe, the present line of the Party, in order to evade existing legislation, is to avoid wherever possible the open advocacy of force and violence."

¹⁵ Since the passage of the Subversive Activities Control Act, the world has become acquainted through the defection of Petrov with Soviet espionage in Australia (see New York Times, September 15, 1955, pp. 1, 14, 15); with the case of McLean and Burgess, the British diplomats, who fled to the Soviet Union; with subsequent defections from this country; and with Soviet espionage in this country (see, e.g., *United States v. Rosenberg*, 195 F. 2d 583, 589, 598-601 (C.A. 2), certiorari denied, 345 U.S. 965; *Abel v. United States*, 362 U.S. 217; *Egorov v. United States*, 319 F. 2d 817 (C.A. 2), petition for certiorari dismissed, 375 U.S. 926; *United States v. Drummond*, S.D. N.Y., pending on appeal, (C.A. 2)).

Ibid. The report also indicated that ten years' investigation by the Committee had established (*id.* at 2):

(1) That the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

Section 2 of the Act set forth in fifteen numbered paragraphs certain findings—based on “evidence adduced before various committees of the Senate and House of Representatives”—which convinced Congress of the necessity for the legislation. Congress found, for example, that “[t]here exists a world Communist movement” consisting of a “world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization” (Section 2(1)). The “direction and control” of this movement was found to be “vested in and exercised by the Communist dictatorship of a foreign country,” not named in the Act (Section 2(4)). This foreign Communist dictatorship, it was further found, establishes “action organizations” in various countries, these organizations being part of a

world-wide Communist organization and controlled by the foreign dictatorship (Section 2(5)). These "Communist-action organizations" seek to bring about "the overthrow of existing governments by any available means, including force if necessary" and to set up in their stead local Communist dictatorships subservient to the parent dictatorship (Section 2(6)). These Communist organizations "are organized on a secret, conspiratorial basis" and operate to a substantial extent through organizations known as "Communist fronts," which are maintained and used so as to conceal their true character and membership (Section 2(7)). Finally, Congress found (Section 2(15)):

The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an in-

dependent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and design to prevent it from accomplishing its purpose in the United States.

Similarly, in the Communist Control Act of 1954, the Congress found (Section 2, 50 U.S.C. 841):

that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States.

* * * [T]he policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement.

3. DETERMINATIONS BY THE COURTS CONCERNING THE NATURE OF THE COMMUNIST PARTY

Even without reference to the Act, this Court, as well as other federal courts, have made similar findings concerning the nature of the Communist Party. The courts have repeatedly recognized the peculiar and dangerous nature of the Communist conspiracy in this country and the world. In particular, they have emphasized that the Communist Party is actively engaged in the world-wide Communist attempt to overthrow the government of the United States. Therefore, they have repeatedly refused to treat it as an ordinary political party in considering the constitutionality of statutes or legislative investigations.

In *American Communications Assn. v. Douds*, 339 U.S. 382, 388-389, the Court said:

Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor

legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. * * *

No useful purpose would be served by setting out at length the evidence before Congress relating to the problem of political strikes, nor can we attempt to assess the validity of each item of evidence. It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.

Mr. Justice Jackson, in the portion of his opinion concurring with the majority in *American Communications Assn. v. Douds*, carefully distinguished the Communist Party "from any other substantial party we have known, and hence [it] may constitutionally be treated as something different in law." He found that Congress, on the basis of material before it, could rationally have concluded that "The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate"; "The Communist Party alone among American parties past or present is dominated and controlled by a foreign government"; "Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal"; and "Every member of the Communist Party is an agent to execute the Communist program." *Id.* at 423, 425, 427, 429, 431.

See also Mr. Justice Jackson concurring in *Dennis v. United States*, 341 U.S. 494, 563-566.

In affirming the Smith Act convictions of the principal leaders of the Communist Party, Judge Learned Hand stated in *United States v. Dennis*, 183 F. 2d 201, 212-213 (C.A. 2), affirmed, 341 U.S. 494:

One may reasonably think it wiser in the long run to let an unhappy, bitter outcast vent his venom before any crowds he can muster and in any terms he wishes, be they as ferocious as he will; one may trust that his patent impotence will be a foil to anything he may propose. * * * Here we are faced with something very different. The American Communist Party * * * is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. * * * The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means.

In concurring in *Sweezy v. New Hampshire*, 354 U.S. 234, Mr. Justice Frankfurter (joined by Mr. Justice Harlan) indicated that a fundamental distinction existed between investigation by a Congressional committee of a witness' political beliefs and into his connection with the Communist Party. "Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party." *Id.* at 266.

In addition, this Court has three times specifically upheld the findings of Congress in Section 3. Mr.

Justice Frankfurter, speaking for the Court in *Galvan v. Press*, 347 U.S. 522, 529, stated:

On the basis of extensive investigation Congress [found] in § 2(1) of the [Internal Security] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship" and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

See also *Carlson v. Landon*, 342 U.S. 524, 535-537; *Harisiades v. Shaughnessy*, 342 U.S. 580, 590.

The earlier history of this Court's attitude toward the Communist Party and the attempts of Congress to deal with it are described at length in *Barenblatt v. United States*, 360 U.S. 109. There the Court upheld the authority of a Congressional committee to inquire whether a witness belonged to the Communist Party. Speaking for the Court, Mr. Justice Harlan said that the justification for Congress' broad power to legislate in the field of Communist activity (*id.* at 127-129):

rests on the long and accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by Congress [citing Section 2 of the Subversive Activities Control Act].

On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary po-

litical party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. * * * To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party was just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II * * * [Emphasis added.]¹⁶

Finally, in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 94-95, this Court again considered the findings contained in Section 2 of the Act concerning the world Communist movement generally and in the United States in particular:

It is not for the courts to re-examine the validity of these legislative findings and reject them. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half. Cf. *Nebbia v. New York*, 291 U.S. 502, 516, 530. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 U.S. 522, 529; *American Communications Assn. v. Douds*, 339 U.S. 382, 388-389.

¹⁶ In *Konigsberg v. State Bar*, 366 U.S. 36, 52, the Court stated that "[t]his Court has long since recognized the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for such illegal ends of powers given for limited purposes." The Court cited *American Communications Assn. v. Douds*, *supra*, and *Barenblatt*.

The Court then stated that it was required to accept the findings "as a not unentertainable appraisal by Congress of the threat which Communist organizations pose not only to existing government in the United States, but to the United States as a sovereign independent nation * * *." *Id.* at 95.

**REPLY BRIEF
FOR
APPELLANTS**

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IN THE
Supreme Court of the United States

October Term, 1963

No. 461

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GURLEY FLYNN,

Appellants,

v.

THE SECRETARY OF STATE.

On Appeal From the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANTS

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I. Substantive Due Process.

A. Our principal brief (pp. 22-26) showed that both Congress and the executive have expressed their judgment that a conclusive presumption, of the sort embodied in section 6, that every member of the Communist Party is ipso facto a security risk is unnecessary, and that the national security can be adequately protected by making Party membership simply one factor to be considered in passing on the qualifications of the individual. The government states (Br. 42) that "the choice between alternative policies is for the Congress." But it is certainly persuasive of the unreasonableness of legislation bristling with due process difficulties that the legislative and executive branches have evidenced approval of an alternative ap-

proach that avoids the most vulnerable feature of the legislation in question.¹

Even the Report of the Commission on Government Security (1957), on which the government relies so heavily, found that the inflexibility of section 6 is detrimental to the national interest. The Report stated (p. 478):

"It is understandable that the Secretary of State, in his role as director of the nation's foreign policy, may consider it advisable to grant a passport under certain conditions. For example, the *Daily Worker's* correspondent was given a passport to attend the Geneva 'summit conference' to foresall Communist propaganda that the established American press would present only the capitalist side of the meeting.

"There is also the possibility, by no means remote, that the Government's intelligence agencies, for the furtherance of their objectives, may want the Secretary of State to grant a passport to a known Communist.

"As the Internal Security Act now stands, if the appellant is within the scope of the defined membership classes, it would be unlawful for the Secretary of State to issue or renew such a passport. We think this is unduly restrictive."

Accordingly, the Report (p. 475) recommended an amendment to section 6 giving the Secretary discretion to issue passports to members of prescribed organizations.²

¹ For First Amendment purposes, the existence of such an adequate alternative is decisive of the unconstitutionality of section 6. *Infra*, p. 17.

² The government argues (Br. 48) that the Secretary already has power to grant exemptions from section 6 by authorizing an individual to travel without a passport pursuant to 22 C. F. R. 53.3(h). But this authorization will be unavailing unless the appropriate official of the country of destination has and chooses to exercise power to waive its requirement making a passport a condition for entry.

The government urges (Br. 14-24) that the history of the passport laws and their administration supports its contention that section 6 is a reasonable regulation of foreign travel. An examination of this history in *Kent v. Dulles*, 357 U. S. 116, 121-25, 127-28, led the Court to conclude that, at least as late as 1926, the administrative practice with respect to the denial of passports had "jelled" around only two categories of applicants—those lacking citizenship or allegiance and those engaged in crime. As the Court stated (at 128):

"One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern."

As the government's brief shows, this lack of consistency continued after 1926. Thus, commencing in 1948, the State Department adopted the practice of granting or denying passports to individual Communists on the basis of its determination of the purpose of the applicant's proposed travel (Br. 24).³ In 1950, the Department instituted the practice of denying passports to all Communists, regardless of the purpose of their travel or their personal fitness and reliability (*ibid.*). This change was not occasioned by any inadequacy of the 1948 practice as a security measure but out of deference to what was thought to be the policy of Congress expressed in section 6. *Kent v. Dulles, supra*, at 140 (dissenting opinion). As the Report of the Commission on Government Security (1957) stated (p. 470):

³ The government states (Br. 23-34) that passports were denied to all Communists from the beginning of World War II until 1948. No authority is cited for this statement, which appears to be incorrect. An authoritative review of passport controls during World War II does not mention any such practice. *Safeguarding the State Through Passport Control*, 12 State Dept. Bull. 1066 (1945). And as noted in our principal brief (p. 32, n. 35), the Board found in the *Party* case that Miss Flynn, a well-known Communist in 1945, travelled to Europe in that year. See also R. 24.

"In retrospect, the Internal Security Act of 1950 can be viewed as a crystallizing force that terminated fluctuations in State Department passport policies and procedures prevalent for years."

Obviously, an administrative practice that was patterned after and adopted because of section 6 (and which the Court has held to be unauthorized) cannot support the reasonableness of the legislation which inspired it.

The government also argues (Br. 36) that section 6 finds support in the practice of denying passports during the Civil War and World War I. The Court answered a similar argument in *Kent* by stating (at 128): "We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power." No more may the due process problem which this case presents be resolved by reference to the war power.

B. The government argues (Br. 48-49) that section 6 satisfies due process because the classification of all Communists as security risks is a reasonable one, at least for the purpose of disqualifying them for foreign travel. The government states (Br. 49) that "Congress acted reasonably in treating all members of Communist-action organizations alike."

As our principal brief showed (pp. 16-19), a disqualification based solely on membership in the Communist Party is unreasonable because the conclusive presumption it establishes is not credible, is contrary to experience, and is unnecessary to meet the alleged evil. As we further showed (Br. 19-22), the Court has applied to Communists the principle that individuals may not be classified as security risks solely on the basis of their organizational membership. Starting from the fundamental proposition that "guilt by association" violates due process, the cases hold that Communist Party membership standing alone cannot support the imposition of criminal liability or civil disabilities. The membership must be accompanied by certain personal fac-

tors, including culpable knowledge, and the member must be permitted to rebut any presumption of disqualification arising from his knowing membership.

The government states (Br. 51) that "this Court has upheld numerous federal and state statutes which had the effect of limiting the liberty of members of the Communist Party as a class without differentiating among them." This assertion is based on a review of the authorities which is factitious when it is not merely misleading.

Our principal brief showed (pp. 19-22) that *Scales v. United States*, 367 U. S. 203; *Adler v. Board of Education*, 342 U. S. 485; and *Wieman v. Updegraff*, 344 U. S. 183, stand for the proposition that a member of the Communist Party may not be denied liberty or even be disqualified for public employment solely because of his membership. The government argues (Br. 53) that the limiting construction which *Scales* gave the membership clause of the Smith Act was constitutionally necessary only because that statute, unlike section 6, directly prohibits membership in proscribed organizations. But the principle which *Scales* recognized was applied by *Adler* and *Wieman* to civil statutes which did not impose such a direct prohibition.

The government represents (Br. 53-54) that *Wieman* related only to past membership at a time when the member was without knowledge or notice that the organization was officially condemned. This is plainly untrue. The oath involved in *Wieman* contained discrete clauses, one disclaiming present, the other past, membership in any organization which was on the Attorney General's list at the time the statute prescribing the oath was passed. See 344 U. S. at 184-86. Yet the court made no distinction between the two clauses, but invalidated both because of their failure to require knowledge of the organization's bad character. *Wieman*, therefore, squarely held that a person may not be disqualified for public employment merely because of present membership in an organization.

which has been officially condemned. *Wieman* has always been so interpreted. See, e.g., *Lerner v. Caspy*, 357 U. S. 468, 474, 477; *Beilan v. Board of Education*, 357 U. S. 399, 414-15 (dissenting opinion); *Barsky v. Board of Regents*, 347 U. S. 442, 473 (dissenting opinion).

Wieman also contradicts the government's thesis (Br. 47, 53-54) that the scienter requirement is satisfied because appellants know that the Communist Party was found to be a Communist-action organization. As the *Wieman* opinion plainly shows, the requisite scienter is knowledge that the organization is bad, not merely that it has been officially found to be bad. Due process does not permit an individual to be condemned simply because he disagrees with a government verdict.⁴

The government recognizes that the statute upheld in *Adler*, unlike section 6, created only a *prima facie* presumption of disqualification because of knowing membership in a proscribed organization.⁵ The government asserts (Br. 54) that *Adler* did not hold that the statutory opportunity to rebut the presumption was constitutionally required. In fact, however, *Adler* answered the due process attack on the statute by stating (at 496, emphasis supplied):

"Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

And see our principal brief, p. 21. The government also seems to distinguish *Adler* on the theory that disqualifica-

⁴ Nor can guilty knowledge be inferred from an individual's leadership position in the organization. *Nowak v. United States*, 356 U. S. 660, 666. If only on that account, there is no merit to the government's invitation to the Court (Br. 48-49) to hold section 6 valid as applied to appellants, while leaving open the validity of its application to "lesser members."

⁵ In this respect the statute was similar to the federal government employees' security program. See our principal brief, p. 23.

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tion for foreign travel "is a considerably milder disability" than a disqualification for public employment (Br. 54). For due process purposes, however, the interest of an individual in holding public employment is not entitled to the protection which must be accorded his constitutional right to travel. See our principal brief, pp. 22, n. 18; 47.

At another point, the government misrepresents *Adler* by stating (Br. 39) that the case "determined that a New York statute, which makes any member of an organization advocating the overthrow of the government by force and violence ineligible for employment in the public schools, was constitutional." This statement omits the very features of the statute which caused the Court to sustain it, namely, those requiring scienter and affording the accused teacher an opportunity to introduce evidence of fitness to overcome the presumption arising from his knowing membership.

The government (Br. 39) cites *Gerende v. Board of Supervisors*, 341 U. S. 56; *Garner v. Board of Public Works*, 341 U. S. 716; *Beilan v. Board of Public Education*, 357 U. S. 399; *Lerner v. Casey*, 357 U. S. 468; *Konigsberg v. State Bar*, 366 U. S. 36; and *In re Anastaplo*, 366 U. S. 82, for the proposition that the Court has "upheld State laws imposing far more severe restrictions upon members of the Communist Party" than those contained in section 6. None of these decisions gives the slightest support to this description.

Gerende is cited (Br. 39) as upholding a Maryland requirement that every candidate for public office swear that he is not engaged in an attempt to overthrow the government by violence. To the contrary, this portion of the oath, which concerned the candidate's personal innocence of crime, was not attacked by *Gerende*. And, of course, this part of the oath has nothing to do with the disqualification of section 6, which is imposed without regard to personal innocence. The portion of the oath

which was at issue in *Gerende* disclaimed membership in an organization engaged in an attempt at violent overthrow. The Court sustained this part of the oath only because Maryland construed it to relate to membership with knowledge of the organization's criminal activity. The sanction of section 6, in contrast, is imposed on persons who have no knowledge that the Communist Party is in fact a Communist-action organization as the Board found it to be, let alone that it is, or even has been found to be, engaged in criminal activity.

Garner involved two separate and distinct questions. One concerned the validity of an oath requiring public employees to disclaim membership in organizations which advocate violent overthrow. As in *Gerende*, *supra*, the Court sustained the oath (at 723-24) by construing it to apply only to membership with knowledge that the organization in fact engages in the proscribed advocacy. The government misrepresents this portion of the decision (Br. 39) by omitting the knowledge requirement that the Court read into the oath. The second question decided by *Garner* was that membership of a person in the Communist Party is relevant to his qualifications for public employment, and hence that he may constitutionally be required to disclose his membership. The Court stated, however (at 720), "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge." Accordingly, nothing in *Garner* supports the government's contention that a person may be disqualified from public employment because of his membership in the Communist Party.

Beilan v. Board of Public Education, *Lerner v. Casey*, *Konigsberg v. State Bar*, and *In re Anastaplo*, all *supra*, simply reiterate the ruling of *Garner* that public employees and applicants for admission to the bar may be required to disclose membership in the Communist Party. Not at

issue was whether such membership, standing alone, was disqualifying. Thus *Lerner v. Casey* states (at 474-75):

"Finally, the claim that the statute offends due process because dismissal of an employee may be based on mere present membership in the Communist Party, without regard to the character of such membership, cf. *Wieman v. Updegraff*, 344 U. S. 183, must also fail. Apart from the fact that the statute simply makes membership in an organization found to be subversive one of the elements which may enter into the ultimate determination as to 'doubtful trust and reliability,' appellant * * * was not discharged on grounds that he was a party member."

The government's reliance (Br. 38-39) on *Harisiades v. Shaughnessy*, 342 U. S. 580; *Galvan v. Press*, 347 U. S. 522, and *Carlson v. Landon*, 342 U. S. 524, is likewise misplaced. These decisions, themselves dubious, rested on the broad power of Congress over the admission and deportation of aliens, uninhibited by requirements of substantive due process. See *Harisiades* at 597 (concurring opinion); *Galvan* at 530-32. Moreover, *Carlson*, which sustained preventive detention of alien Communists awaiting deportation, has been undermined by *United States v. Witkovich*, 353 U. S. 194, discussed in our principal brief, pp. 28-29.⁶

⁶ The government also relies (Br. 52) on decisions sustaining state legislation that disqualified aliens from certain occupations or from the ownership of land or the enjoyment of its fruits. To the extent that these decisions may have continuing validity (see *Takahashi v. Fish Commission*, 334 U. S. 410, and *Oyama v. California*, 332 U. S. 633, 646, 649, 672), they rest on such considerations as the historically limited nature of the rights of aliens, the deference accorded the judgment of a state legislature in a matter of local concern, or the lack of importance attached to the interest affected. Similarly, the result in *Flemming v. Nestor*, 363 U. S. 603, 611-12 (Gov. Br. 39) turned on petitioner's status as a deported alien and on what the Court considered the ephemeral nature of his interest in "a non-contractual benefit under a public welfare program."

United States v. Balint, 258 U. S. 250 and *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, also relied on by the government (Br. 47), are not remotely relevant. These decisions stand for the proposition that the legislature need not require a *mens rea* for the punishment of harmful conduct falling within the category of "public welfare offenses." See *Morrisette v. United States*, 342 U. S. 246, 252-56. Section 6, however, deprives persons of their liberty without proof that they have engaged in harmful conduct, but upon the mere suspicion that they may do so. The issue which section 6 presents is whether, at a minimum, this suspicion must not have a more substantial foundation than bare organizational association, stripped of guilty knowledge and intent.

Hawker v. New York, 170 U. S. 189, cited by the government (Br. 52), is likewise wide of the mark, since the disqualification it sustained was for personal misconduct evidenced by a felony conviction, not for anticipated future misconduct presumed from nothing but association.

The government's only remaining authority is *American Communications Association v. Douds*, 339 U. S. 382, to which its brief refers repeatedly but without attempting to answer the demonstration of our principal brief (pp. 46-48) that the case, if correctly decided, is inapplicable.

C. If all the stories told by Communist defectors in their books and their outpourings before Congressional Committees are fully credited, they establish, in the words of the government's summary (Br. 56-57), that, "travel by Communist Party members provides opportunity for communication of information between components of the world Communist movement, for training, for espionage and propaganda activities, and for transmittal of American passports which may be used by Soviet agents."

It should first be observed that for the past 28 years American Communists have made no use of the opportunities thus afforded them. As the Board found in the *Party*

case, American Communists have not gone abroad for any of these purposes since 1936. See our principal brief, p. 32. Nothing in the government's review of what it calls "the evidence" (Br. 25-35) is at variance with the Board's findings.

Moreover, as the government recognizes (Br. 46), the foreign training and "propaganda activities" of American Communists, and their interchange of information with foreign Communists, are not unlawful and are protected by the First Amendment.

There remains the argument that section 6 is justified by the "danger" that foreign travel gives American Communists an opportunity for espionage or to turn their passports over to Soviet spies.

The government does not and cannot cite a single case of espionage involving foreign travel by an American. "Spies and traitors do not usually travel abroad. Rather, they remain inconspicuously at home, as recent unfortunate cases have demonstrated." Parker, *The Right to Go Abroad*, 40 Va. L. Rev. 853, 873. The government argues (Br. 49) that appellants are leaders of the Communist Party and therefore "are exactly the kind of Party members whom Congress could reasonably believe should be barred from travel." But it is absurd to suppose that such marked figures would be selected for an espionage mission involving foreign travel, even if it were believed that they would accept one.

The lack of any genuine relation between section 6 and the danger of espionage also appears from the limited coverage of the section. Would a genuine anti-espionage law prohibit suspects from travelling to Monte Carlo but not to Latin America? Will spies desiring to travel abroad to perform their mission be prevented from doing so by a prohibition that is effective only so long as they remain members of the Communist Party? Can the prevention of face to face contact abroad be of any value for security

purposes while alternative means of communication remain open? The text of the statute is itself sufficient to demonstrate that the alleged danger of espionage is a pretext.

The notion that section 6 will be useful in preserving the integrity of United States passports is similarly insubstantial. First, it assumes that a nation presently engaged in racing us to the moon is incapable of counterfeiting our passports if disposed to do so. Second, even if the assumption were warranted, it would not justify burning the house to roast the pig. The danger could be met, as it was in World War II, by requiring citizens to surrender their passports upon reentering the United States rather than by prohibiting them from travelling. *Safeguarding the State Through Passport Control*, 12 State Dept. Bull. 1066, 1068.

"The word 'Communist' is not an incantation subverting at a stroke our Constitution and all our cherished liberties." *Briehl v. Dulles*, 248 F. 2d 561, 584 (Bazelon, J., dissenting). The government's argument, like the statute it defends, disregards this injunction. In contrast is the 1958 report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York. The report, entitled *Freedom to Travel*, states (pp. 42-43):

"Neither membership in, nor support of, any organization, short of violation of the Smith Act, is punishable in the United States, and these should not serve as criteria for limitation of travel. If travel is to be restrained, as sometimes it must be, there should be an evidentiary showing that the travel of the particular applicant will constitute a definable danger to the national security of the United States. It is anticipated action rather than contemplated speech which should serve as the basis for restricting such an important freedom as that of travel abroad.

⁷ "Conspirators could still use the mails, cables, telephones, radios and, not least, foreign embassies and consulates in the United States." *Briehl v. Dulles*, 248 F. 2d 561, 586 (Bazelon, J., dissenting).

"In so stating, the Committee is aware that there are disadvantages, and even risks, in issuing passports to some supporters of the Communist Party. However, the Commission believes that the somewhat conjectural danger that might be involved in the adoption of a policy to issue passports to such individuals is far outweighed by the affirmative advantages to be achieved from close adherence to the high ranking value represented by the ideal of free travel. Travel of an individual should be restrained only upon a clear showing of real danger to the nation which would follow from the travel of the particular applicant. The generalized taint which properly attaches to the Communist Party as an organization should not be carried over to restrain the travel of an individual without evidence which specifically links the individual to dangerous activity abroad."

See also *Id.*, pp. 12, 58-62.

II. The First Amendment.

A. The government states that, "Section 6 regulates only conduct—more specifically foreign travel" (Br. 55), and "imposes only indirect, peripheral restrictions" (Br. 56) on First Amendment rights. It concludes from this (Br. 57) that the issue presented by section 6 is whether its "incidental restraint on rights protected by the First Amendment was appropriate and reasonable under all the circumstances." We show first that the government's premise is fallacious, and then that its conclusion does not follow from the premise.

1. The purpose of section 6 is to prevent American Communists from communicating or associating with the Communists of other countries. As our principal brief pointed out (p. 37), this purpose is expressly stated in section 2(8). The government's brief (p. 81) provides further documentation of our point from the Report of the Commission on Government Security, which stated:

"The passport is an important instrument in support of the recognized Communist technique of communication by personal contact. It has been employed over the years to insure the presence of American Communists and Americans under Communist discipline at Soviet centers for indoctrination and training, including the Lenin School in Moscow. It has been utilized by Communist sympathizers as a vehicle for their attendance at and participation in activities of international Communist propaganda organizations. It has been a device for the movement of Soviet agents and spies into and out of the United States and other free nations of the world."

"Communication" is a First Amendment freedom, a fact which cannot be altered by characterizing it as a "Communist technique," "indoctrination and training," and "propaganda." Accordingly, section 6 was designed to, and does, prevent speech and association of American Communists. Section 6, therefore, is a direct and calculated restraint of First Amendment interests. What is "incidental" is the section's effect on travel.

American Communications Association v. Douds, supra, at 396, held that section 9(h) of the Taft Hartley law did not directly restrain First Amendment rights on the ground that it "does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political associations and beliefs." Here, in contrast, there is no claim that travel, as such, by American Communists is "harmful con-

duct." * What is feared are "the consequences of speech" and association which Communist travellers may engage in.⁹

The association and expression which section 6 restrains includes that which is peaceable and therefore constitutionally protected. This the government concedes (Br. 46). It follows that section 6 is invalid because it is a direct abridgment of rights guaranteed by the First Amendment.

Section 6 is not only a direct, but also a prior, restraint of expression and association. It is therefore invalid under *Lovell v. Griffin*, 303 U. S. 444, and the kindred cases cited in our principal brief (p. 42). That section 6 is in form a regulation of the issuance and use of passports is no more pertinent than the fact that the ordinances condemned in *Schneider v. Irvington*, 308 U. S. 147, as restraints of the distribution of leaflets, took the form of regulations of the use of the streets.

That section 6, as applied in this case, is not a curb on unlawful acts or "dangerous" advocacy, also appears from the fact that the denial of travel rights to appellants was based solely on their membership in an organization which was *not* found by the Board to have engaged in any such acts or advocacy. See our principal brief, pp. 35-36.

The government contends (Br. 62) that this fact is of no import for two reasons. First, it says, "Congress found

* As we have shown (*supra*, pp. 10-12), the government's claim that section 6 was designed in part as an anti-espionage measure is untenable. Moreover, if that were the Congressional purpose, it would not justify a control that is not limited to the prevention of espionage but operates as a broad restraint on First Amendment rights. See *infra*, pp. 16-18.

⁹ "If the design of the passport statutes, in depriving an individual of the right to travel, is to prevent him from making statements abroad critical of or embarrassing to our policies, or offensive to our political taste, they are the very type of legislation the First Amendment forbids." *Bricht v. Dull's*, 248 F. 2d 561, 586 (Bazelon, J., dissenting).

in Section 2(15) that Communist-action organizations present a clear and present danger," and the Board "was not required to repeat the finding made by Congress." The Congressional finding of a clear and present danger has no constitutional significance. Since the First Amendment is a limitation on the legislative power, it must be applied by the courts. Otherwise Congress could escape the limitation merely by self-serving declarations. Accordingly, "The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts." *Dennis v. United States*, 341 U. S. 494, 513. Moreover, the existence of a clear and present danger depends on the content of a particular expression or the nature of a particular association and the circumstances of their occurrence. It must therefore be determined on the facts presented by each case as it arises and cannot be legislatively found in advance. The facts shown here are those which emerge from the record of the *Party* hearing before the Board, and include no dangerous advocacy or unlawful acts.

The government's second argument (Br. 62) is that the absence of findings or evidence of unlawful acts or dangerous advocacy is of no moment because the Court "rejected the same contention in the *Communist Party* case, 367 U. S. at 56, on the ground that the 'Subversive Activities Control Act is a regulatory, not a prohibitory statute.'" The Court's comment, however, was made solely with respect to the registration requirements of the Act (see 367 U. S. at 78-79), and has no application to section 6 which is plainly "a prohibitory statute" (see our principal brief, pp. 36-37).

2. The First Amendment does not prohibit only "direct" restraints of speech and association. It bars any governmental *abridgment* of those rights. Inquiry into whether legislation violates this bar is not foreclosed by

the fact that it is superficially addressed to action. See *Thomas v. Collins*, 323 U. S. 516, 547; *American Communications Association v. Douds*, *supra*, at 399. Furthermore, even where legislation is addressed to unlawful action, it will be invalid if its deterrent effect on the exercise of First Amendment rights outweighs the importance of the legislative objective, or if the legislation unnecessarily interferes with First Amendment interests. *American Communications Association v. Douds*, *supra*, at 399-401; *Communist Party v. S. A. C. B.*, *supra*, at 91, 93, 102; *Schnitzer v. State*, 308 U. S. 147, 163.

We have seen that section 6 directly restrains the First Amendment rights of travellers to communicate and associate. In addition, it is, as the government acknowledges, an indirect restraint on the First Amendment right of association in the Communist Party. This is so because the section's prohibitions attach by reason of, and hence are a discouragement to, Party membership. Section 6 violates the First Amendment even if we consider it only in this latter aspect.

On the one hand, the section is excessively broad in its effect on association. For it prohibits travel by, and therefore discourages the association, not only of persons who seek to travel abroad for sinister purposes or who otherwise have evil intentions and knowledge, but also of persons who have no baneful purposes or views. Nor does the section permit the latter to obtain travel rights by proving their innocence. As our principal brief shows (pp. 23-26), Congress had available to it alternative forms of travel control, fully satisfactory to the executive branch, which would have avoided such unnecessary interference with constitutionally protected association, while affording adequate protection against any genuine danger. On the other hand, as we have seen (*supra*, pp. 11-12), section 6 is an inept vehicle for controlling dangerous conduct or expression.

Thus the section sacrifices constitutionally protected association for no legitimate purpose.

The government's only answer (Br. 61, n. 16) is that "Congress could reasonably consider members of Communist-action organizations as a class which threatened American security." We have already seen that there is nothing reasonable about such a classification. But even if the government were right, its argument is irrelevant. "Reasonable classification" is a due process requirement. It does not satisfy the more stringent requirements of the First Amendment. See our principal brief, pp. 39-41.

B. The government contends (Br. 49, 64, n. 17) that the validity of section 6 should be passed upon only in terms of its application to appellants, and that the Court should not consider the impact of the statute on "lesser members of the Communist Party," members of organizations ordered to register as Communist-fronts, or the many other persons whose association and expression will be inhibited by section 6.

We have shown that section 6 is unconstitutional when viewed solely in its application to appellants. Moreover, where a statute curtails First Amendment rights, the Court's examination of the constitutional issue is not made with a narrow angle lens that focuses exclusively on the parties before it. Instead, the impact of the statute in all its applications must be considered. See our principal brief, p. 43.

The government says (Br. 61) that "section 6 applies only when an individual becomes a Party member," and that no one is "deprived of an opportunity to travel on the basis of any particular views, since an individual may entertain and express Communist beliefs and ideology and never come within the statute." But the First Amendment protects the right of association as well as views. Moreover, the experience of the past fifteen years demonstrates

that it is precisely views, beliefs and ideology which are the accepted hallmark of membership in the Communist Party. And section 5 of the Communist Control Act has enacted these indicia of Party membership into law.¹⁰

Nor will it do for the government to argue (Br. 70) that Communist Party members may escape the sanction of section 6 "by simply resigning from the Party." Persons cannot be compelled to barter their constitutional right of association for an opportunity to exercise their constitutional liberty to travel. Moreover, because beliefs and expression are the badge of Communist Party membership, a resignation for the purpose of enjoying rights denied to members is not the simple process that the government's brief makes it appear. For example, a trade union officer was convicted of making a false Taft-Hartley affidavit on the testimony of government "experts" that his published resignation was couched in "Aesopean language," construed to reaffirm his membership; that the failure of the Party to denounce him showed that his resignation was in bad faith, and that he had appeared as a speaker at a public celebration of May Day. *Gold v. United States*, 237 F. 2d 764, 767-69; rev'd on other grounds, 352 U. S. 985. See also, *Travis v. United States*, 269 F. 2d 928, 937-38. It is apparent that no Communist Party member can be assured of the right to travel abroad unless he not only surrenders his right of association by resigning but also renounces his views and beliefs.

It is therefore disingenuous for the government to assure the Court (Br. 63) that there is "little possibility any person will be unfairly considered as a member of a Com-

¹⁰ The government concedes (Br. 56, n. 14) that the crucial factor in determining Party membership under section 5 is whether the individual in question is "dedicated to furthering the [world Communist movement's] objectives."

munist-action organization when in fact he is not."¹¹ At a minimum, section 6 will subject all passport applicants who are suspect to the indignity of government loyalty hearings probing their views and associations. Under these circumstances, section 6 is bound to inhibit the exercise of the First Amendment freedoms of every American who may wish to travel abroad.

This case cannot be affirmed without legitimatizing for the first time the principle that citizens may be deprived of constitutionally protected liberties on the basis of a conclusive presumption of unfitness derived solely from organizational membership. History attests that such a precedent is incompatible with a free society. More than a century ago, Lord Macaulay stated:

"To punish a man because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrine with him, that he will commit a crime, is persecution, and is, in every case, wicked and foolish." *Historical Essays*, London, 1932, pp. 7-8.

Respectfully submitted,

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¹¹ Little comfort can be had from the fact that the State Department has the burden of proof when the burden is not to prove membership but merely "reason to believe that the applicant belongs" (Br. 64).